

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE  
JUSTICE SUJOY PAUL  
&  
JUSTICE ACHAL KUMAR PALIWAL**

**CRIMINAL APPEAL No. 2630 OF 2015**

**BETWEEN :-**

**RAMSWAROOP, S/O BALAK SINGH  
MARSKOLE, AGED ABOUT 26 YEARS,  
R/O ATAMA, P.S. CHHAPARA, DISTRICT  
SEONI (MADHYA PRADESH)**

**....APPELLANT**

***(BY SHRI RAMANUJ CHOUBEY - ADVOCATE)***

**AND**

**STATE OF MADHYA PRADESH, THROUGH  
POLICE STATION - CHHAPARA,  
DISTRICT SEONI (MADHYA PRADESH)**

**.....RESPONDENT**

***(BY SHRI YOGESH DHANDE - GOVERNMENT ADVOCATE)***

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Reserved on : 26/07/2023

Pronounced on : 02/08/2023

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*This Criminal Appeal having been heard and reserved for judgment, coming on for pronouncement this day, **Justice Sujoy Paul** pronounced the following :*

**J U D G M E N T**

This Criminal Appeal filed under Section 374(2) of Criminal Procedure Code (Cr.P.C.) impugns the judgment dated 03/7/2015 passed in Special Sessions Case No.60/2014 by learned Special Judge,

(Protection of Children from Sexual Offences Act, 2012) (POCSO Act), Seoni, M.P. whereby appellant was held guilty for committing certain offences and directed to undergo the sentences which are mentioned hereinbelow in a tabular form :-

<b>Convicted under Section</b>	<b>Sentenced to undergo</b>
342 of the IPC	R.I. for 6 months.
506 of the IPC	R.I. for 01 year.
376 (2)(f) of IPC	Life imprisonment and fine of Rs.25,000/-, in default to suffer additional R.I. for 02 years.
3 read with 4 of Protection of Children from Sexual Offences Act, 2012.	
With the direction that all the sentences shall run concurrently.	

2. Briefly stated, the case of the prosecution is that the prosecutrix (PW-8) alongwith his younger brother was going to village Tilepani on 31.05.2014 at 2:40 PM. The parents of prosecutrix were at Bhorgarh relating to their employment. Grandparents of prosecutrix were at home and when her brother reached near the house of appellant Ramswaroop, appellant called them and asked them to drink water before proceeding further. The appellant is uncle of prosecutrix and therefore, she and her brother trusted him. The appellant asked the younger brother of prosecutrix to bring 'Bidi' from nearby shop. Consequently, younger brother went to follow the instructions of appellant. The prosecutrix was sitting in the outer room of the house of the appellant. The prosecutrix after some time said that she is leaving but appellant scolded her and stated that you will not go anywhere and

caught hold of her. The prosecutrix could escape and tried to run away but appellant followed her and caught hold of her. He forcibly took her inside the house and committed sexual assault. She was further threatened that if she disclose the fact of sexual assault to anybody she will face dire consequences. When appellant went inside to take water, the victim fled away and ultimately reached her village Atama and narrated the incident to her grandparents. When parents of the prosecutrix came back to their village on the next date i.e. 01.06.2014, the prosecutrix informed them about the incident. The parents alongwith prosecutrix reached Police Station Chhapara and lodged the report.

**3.** Vide Crime No.191/2014 offences under Sections 376(2)(f) & 506 of I.P.C. and 4/8 under POCSO Act were registered through F.I.R. (Ex.P/7). After obtaining consent of prosecutrix and her parents, she was medically examined and medical report (Ex.P/3) was obtained. Statement of prosecutrix under Section 164 of Cr.P.C. was recorded. The spot map (Ex.P/9) was prepared.

**4.** The samples from private part of victim as well as her clothes were seized through (Ex.P/20). Appellant was arrested on 02.06.2014. The appellant was also medically examined and medical report (Ex.P/4) was placed on record. The sealed packets aforesaid were sent to Forensic Science Laboratory (FSL), Sagar through letter of Superintendent of Police, Seoni dated 07.6.2014 (Ex.P/22). In turn, FSL report dated 25.8.2014 (Ex.P/23) was received. After completion of investigation, the challan was filed before Judicial Magistrate First Class, Lakhnadon on 23.06.2014. In turn, the matter on committal

travelled before the Special Judge. The appellant abjured the guilt and prayed for full-fledged trial. In the statement recorded under Section 313 of Cr.P.C., the appellant admitted that he is uncle (*Chacha*) of prosecutrix. The father of prosecutrix obtained a loan fraudulently on the land of appellant's father because of that there exists an enmity/dispute between the parties and prosecutrix has falsely arraigned him.

5. The Court below framed six questions for its determination, recorded statements of 11 prosecution witnesses and after hearing the parties, passed the impugned judgment.

**Contention of Appellant :**

6. Shri Ramanuj Choubey, learned counsel for the appellant submits that Court below has committed an error in determining the age of prosecutrix. The age determination is based on the Admission and birth Register of the school. The statements of father, mother and grandmother of victim (PW-1) (PW-2) and (PW-3) respectively are at variance about the age of victim. The parents are the best persons to disclose about the age of the child. Reliance is placed on a Division Bench judgment of this Court in **M.Cr.C. No. 2340 of 2016 (State of Madhya Pradesh vs. Salman Khan)** decided on 30.06.2016. By taking assistance of judgment of Supreme Court reported in **(2016) 1 SCC 696, State of M.P. vs. Munna alias Shambhoo Nath**, it is urged that the age of prosecutrix cannot be determined on the basis of school register. For the same purpose, the recent judgment of Supreme Court in **P. Yuvaprakash vs. State Rep. By Inspector of Police 2023 SCC**

**OnLine SC 846** decided on July 18, 2023 is also relied upon. Reliance is placed on the following finding of the Supreme Court -

“As held earlier, the document produced, i.e. a transfer certificate and extracts of the Admission Register, are not what section 94(2)(i) mandates; nor are they in accord with section 94(2)(ii) because DW-1 clearly deposed that there was no records relating to the birth of the victim.”

It is vehemently argued that determination of age has to be based as per the statutory provision. Since offence in the instant case was allegedly committed on 31.05.2014, **Juvenile Justice (Care and Protection of Children) Act, 2015** (J.J. Act) is not applicable. Instead, Rule 12 of **The Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007)** which was held to be *pari materia* to section 94 of J.J. Act by the Apex Court in the case of **P. Yuvaprakash (supra)** will be applicable. Since prosecution could not establish with certainty that prosecutrix was a minor, conviction of appellant under the POCSO Act is liable to be interfered with.

7. Shri Choubey, learned counsel for the appellant urged that father of victim (PW-1) in para-7 of his cross-examination admitted that in the villages the parents used to enter the names of their children without there being any proof thereof. Thus, the determination of age of prosecutrix by the Court below is totally erroneous. To establish the factum of animosity, attention of this Court is drawn to the testimony of father of victim (PW-1) wherein he admitted that the money relating to agricultural loan was withdrawn by his ‘*Aaji*’. She withdrew the amount from the account and used that amount to construct a well.

Mother of prosecutrix (PW-2) admitted that a dispute occurred between her husband and father of appellant relating to repayment of loan. In view of these statements of parents of prosecutrix, it is submitted that appellant was roped in falsely because of animosity and the case of prosecution is not creditworthy.

8. The medical examination report of victim (Ex.P/16) and statement of Dr. Ushashri Pandey (PW-5) were relied upon. It is strenuously contended that in para-5 of her deposition, the doctor opined that she is not satisfied with the age of victim disclosed by her and therefore, gave opinion for her X-ray examination.

9. The statement of the younger brother (PW-4) of prosecutrix was recorded under Section 164 of Cr.P.C. after 28 days from the date of incident. This witness was accompanying the victim when incident had taken place. Para-6 of his deposition is referred to where he admitted that he is deposing in the Court as per the instructions given by his parents. Thus, this witness is a tutored witness.

10. The statement of victim (PW-7) was highlighted to show that she could not remember her date of birth. Her school card was given to police by her uncle (*Fufa*). The parents did not tell her about her date of birth. In this backdrop, it is submitted that her statement does not inspire confidence.

11. The testimony of Suresh Kumar Uikey (PW-9), Headmaster of Primary School, Atama, is referred to, who produced the Admission Register (Ex.P/13) before the Court below. He admitted that date of birth was recorded in the Register as per the instruction of father of

prosecutrix. The date of birth Register (Ex.P/13) was also produced before the Court below.

12. These witnesses stated that in the rural environment, sometimes parents are not able to inform the correct date of birth of the child, therefore, the date is often recorded on the basis of ‘*assessment*’. He further admitted that against the relevant entries of Admission Register there exists no signature of teacher / officer.

13. Learned counsel for the appellant urged that the **Madhya Pradesh Date of Birth (Entries in the School Register) Rules, 1973** (Rules of 1973) prescribes the method for entering the date of birth in the school Register. A declaration form, as prescribed in the said Rules, was required to be filled up and submitted by the parents. In absence thereof, the date of birth recorded in the Admission Register is not trustworthy.

14. Reference is made to a judgment of Supreme Court in **Review Petition (Criminal) Nos. 306-307 of 2013 in Criminal Appeal Nos. 145-146 of 2011 (Rajendra Pralhadrao Wasnik Vs. State of Maharashtra)** to bolster the submission that in view of statutory mandate ingrained in Section 53A of Cr.P.C, it was incumbent and obligatory on the part of prosecution to send the samples for the DNA test. In the instance case, no DNA test was conducted. Thus, an adverse presumption must be drawn against the prosecution. Curiously, a recent Division Bench judgment of this Court in **Dinesh Yadav Vs. State of Madhya Pradesh (Criminal Appeal No. 728 of 2019)** decided on 12.04.2023 was also referred by Shri Choubey to bolster his submission that DNA test was mandatory.

**Contention of the State Counsel:-**

15. Shri Yogesh Dhande, learned counsel for the State supported the impugned judgment and urged that even assuming that there was an enmity / dispute between the parties, the appellant cannot get a clean chit. Since prosecution has led credible evidence to bring home the charge, existence of previous enmity (if any) will not wash it off.

16. Prosecutrix deposed against the appellant with necessary clarity. Her statement is of sterling quality. In view of the judgment of this Court in **Dinesh Yadav (Supra)**, the conviction can be recorded solely on the basis of statement of prosecutrix, if it is of sterling quality.

17. So far determination of age is concerned, Shri Dhande placed reliance on **Jarnail Singh v. State of Haryana (2013) 7 SCC 263**, **Ashwani Kumar Saxena v. State of M.P. (2012) 9 SCC 750**, **In Reference vs. Ramnath Kewat @ Bhursoo ILR 2023 MP 353 (DB)**, **Umesh Chandra vs. State of Rajasthan 1982(2) SCC 203**, **State of Madhya Pradesh vs. Anoop Singh (2015) 7 SCC 773** and **Mahadeo S/o Kerba Maske vs. State of Maharashtra and another (2013) 14 SCC 637**.

18. So far merit of the case is concerned, learned Govt. Advocate urged that apart from oral evidence of prosecutrix, the MLC and statement of Dr. Ushashri Pandey (PW-5) leaves no room for any doubt that victim was subjected to sexual assault. Heavy reliance is placed on para-3 of her deposition. In the 'opinion' part of her statement, she in no uncertain terms made it clear that victim was subjected to sexual intercourse. This statement of victim is corroborated by producing medical evidence.



19. FSL Report (Ex.P/23) shows that in the vaginal slide (Article-C), underwear (Article-D) and *salwar* of victim (Article -E), human semen marks and semen were found. Thus a conjoint reading of statements of victim, Dr. Ushashri Pandey (PW-5), medical report and FSL report leaves no room for any doubt that the victim was subjected to rape by her uncle i.e. appellant. In view of the statutory presumption, as per Section 29 and 30 of POCSO Act, the appellant was rightly held guilty.

20. Lastly, it is submitted that if DNA test was not conducted, the entire trial and credible evidence will not become redundant. Interestingly, reliance is placed on the same judgment of **Dinesh Yadav (Supra)**.

21. The parties confined their arguments to the extent indicated above.

22. We have heard the parties at length and perused the record.

**Previous Enmity :-**

23. This is trite that enmity is a double edged sword. Supreme Court in **Ramesh Baburao Devaskar and others vs. State of Maharashtra (2007) 13 SCC 501** held that ‘enmity, as is well known, is a double-edged weapon’.

24. We find substance in the argument of Shri Dhande, learned Govt. Advocate that mere existence of previous dispute will not demolish the case of prosecution if prosecution is otherwise able to establish its case on merits. Hence we need to examine all the points raised by the parties.

**Determination of Age :-**

25. Parties were at loggerheads on the aspect of determination of age. It is apposite to mention that since incident had taken place on 31.05.2014, Rule 12 of Rules of 2007 will hold the field. The relevant portion of said Rule reads as under :-

**“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.

(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 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.”

26. The Apex Court way back in the case of **Umesh Chandra (supra)** opined as under :-

**“7.** We agree with the High Court that in cases like these, ordinarily the oral evidence can hardly be useful

to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable because it can be prepared at any time to suit the needs of a particular situation. To this extent, we agree with the approach made by the High Court.

**(Emphasis Supplied)**

27. The Apex Court in **Jarnail Singh v. State of Haryana, (2013) 7 SCC 263** opined that :-

“23. ....Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon.”

28. The Apex Court considered Rule 12 of Rules of 2007 in several judgments. It is apposite to consider the legal journey in this regard.

29. In the case of **Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681**, the Apex Court has opined as under :-

“14. There cannot furthermore be any doubt whatsoever that the same standard is required to be applied for the purpose of Section 35 of the Evidence Act both in civil as also criminal proceedings, as was held by this Court in *Ravinder Singh Gorkhi v. State of U.P.*”

**(Emphasis supplied)**

30. The Apex Court in **Shah Nawaz v. State of U.P., (2011) 13 SCC 751** ruled thus :-

“24. We are satisfied that the entry relating to date of birth entered in the marksheet is one of the valid proofs of evidence for determination of age of an accused person. **The school leaving certificate is also a valid proof in determining the age of the accused person.** Further, the date of birth mentioned in the High School marksheet produced by the appellant has duly been corroborated by the school leaving certificate of the appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd-o-Kalan and recorded by the Board. The date of birth of the appellant has also been recorded as 18-6-1989 in the school leaving certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-o-Kalan, Muzaffarnagar **as well as the said date of birth mentioned in the school register of the said School at Sl. No. 1382 which have been proved by the statement of the Principal of that School recorded before the Board.**”

(Emphasis supplied)

31. In **Ashwani Kumar Saxena (Supra)**, it was held as under :-

“38. We fail to see, after having summoned the admission register of the Higher Secondary School where the appellant had first studied and after having perused the same produced by the Principal of school and having noticed the fact that the appellant was born on 24-10-1990, what prompted the court not to accept that admission register produced by the Principal of the school. **The date of birth of the appellant was discernible from the school admission register.** Entry made therein was not controverted or countered by the counsel appearing for the State or the private party, which is evident from the proceedings recorded on 11-2-2009 and

which indicates that they had conceded that there was nothing to refute or rebut the factum of date of birth entered in the school admission register. We are of the view that the above document produced by the Principal of the school conclusively shows that the date of birth was 24-10-1990, hence, Rules 12(3)(a)(i) and (ii) of the 2007 Rules have been fully satisfied.

**43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.**

**(Emphasis supplied)**

**32.** A three Judge Bench of Apex Court in **Abuzar Hossain v. State of W.B., (2012) 10 SCC 489** has opined as under :-

**“39.3. .... The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected.**

**(Emphasis supplied)**

**33.** The Apex Court in **Mahadeo v. State of Maharashtra, (2013) 14 SCC 637** has held as under :-

**“13.** In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the

prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.”

**(Emphasis supplied)**

**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.

**36.** In **Abuzar Hossain** a three Judge Bench of Supreme Court drawn the curtains on the issue by holding that the credibility/acceptability of a document needs to be determined in the facts and circumstances of each case and no hard and fast rule can be prescribed. The similar view was taken by Apex Court in **Rishipal Singh Solanki vs. State of U.P. (2022) 8 SCC 602**. The judgment of **Rishipal Singh Solanki (supra)** was followed by the Division Bench of this Court in **2022 SCC OnLine MP 1826 (Ramnath Kewat vs. State of M.P.)**.

**37.** By following the *ratio decidendi* of the judgment of **Ashwani Kumar Saxena (supra)** in **Raje vs. State of M.P., 2013 SCC OnLine MP 10475**, this Court opined that date of birth can be determined on the basis of Admission Register of School as per Rules of 2007. Hence, Admission Register is indeed an important piece of evidence.

**38.** In **Ramnath Kewat (supra)** principle laid down by Supreme Court in **Rishipal Singh Solanki (supra)** was followed by us that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be based on the material on record and on appreciation of evidence adduced by the parties in each case. The words of caution were added by the Apex Court by holding that when determination of age is on the basis of school records, the

requirement of Section 35 of Indian Evidence Act must be satisfied. We have already held in para-34 that the Admission Register so produced fulfills the said requirement.

The birth Register (Ex.P-14C) was produced and proved by producing Suresh Kumar Uikey (PW-9) before the Court below. A bare perusal of the relevant portion of birth Register shows that the date of birth of victim is recorded as 28.06.1996. The same date of birth was also written in words. In a specific column of the Register, the father certified that the date of birth of his daughter is 28.06.1996 and under this certification / declaration put his signature. Thus, the requirement of declaration, even otherwise is satisfied. Whether or not said declaration was in a prescribed form as per the Rules of 1973, will not make any difference. It is the content which is important and not the form. The statement of father of victim that in rural areas sometimes parents narrate the date of birth of their ward on the basis of assessment is, in our opinion, a general statement not made by him in relation to entry of date of birth of victim. We are of the view that if prosecution is able to prove the date of birth in consonance with the requirement of J.J. Act by producing the Admission Register or any other document, the Court is not required to go beyond and behind the said document and conduct a roving inquiry as to on what basis said date of birth was recorded. We say so because the legislative intent ingrained in Section 94 shows that the law makers have placed reliance on certain documents on the strength of which age can be determined. If said test is fulfilled by producing relevant document, the Courts are



not obliged to examine further source of such declaration or entry mentioned in the said document.

**39.** In our opinion, when Rules of 2007 prescribes the method for determination of age, the statement of parents cannot form basis for determination of age. In other words, variation in their statements regarding date of birth/age of victim, will not throw the documentary evidence i.e. Admission Register and date of birth Register of the school to the winds. In the said documents, the date of birth of victim is recorded as 28.6.1996. This entry was made when prosecutrix was admitted in Class I. Thus, in the light of judgments of Supreme Court in aforesaid cases, the admission and date of birth registers can form basis for determination of age of the prosecutrix.

**40.** In **P. Yuvaprakash (supra)** it was held that as held earlier, the document produced, i.e. a transfer certificate and extracts of the Admission Register, are not what section 94(2)(i) mandates; nor are they in accord with section 94(2)(ii) because DW-1 clearly deposed that there was no records relating to the birth of the victim. A careful reading of this judgment shows that various Division Bench judgments of Supreme Court were not brought to the notice of the Court in **P. Yuvaprakash**. The judgment of **Shah Nawaz, Ashwani Kumar Saxena** and **Ram Suresh Singh (supra)** were even not cited before the Apex Court. As per these judgments, Admission Register's entry can be relied upon for determination of age. Thus, judgment of **P. Yuvaprakash (supra)** does not improve the case of the appellant.

**41.** The judgment of **Abuzar Hossain (supra)** (decided by a Bench of three Judges) was also not cited in the case of **P. Yuvaprakash**

(supra). The judgment of **Rishipal Singh Solanki (supra)** was although referred to, the Apex Court has not distinguished the principles laid down in the said case. It needs no mention that if a judgment of Supreme Court of larger strength is holding the field, the said judgment will be binding on this Court in comparison to the judgment which is passed by a Bench of lesser strength.

42. A Special Bench (five Judges) of this Court in **Jabalpur Bus Operators Association and others vs. State of M.P. and another 2003(1) M.P.H.T. 226 (FB)** opined as under :

“9. ....In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a larger Bench is binding on smaller Benches.”

**(Emphasis supplied)**

43. As per *ratio decidendi* of this judgment, if previous Division Bench judgments were not considered by the subsequent Bench, the previous Division Bench judgment will be binding. For this reason, in our opinion, the argument of appellant cannot be accepted that Admission Register and date of birth Register cannot form basis for determination of age. Thus, we find no flaw in the method adopted by the Court below for the purpose of determination of age.

44. The Rules of 1973 are procedural in nature. The rustic villagers and common man is not supposed to know about the said Rules when they visit the school for admission of their ward. If a declaration is obtained from the parents by the school, as per Rules of 1973, it will undoubtedly give more weightage to the entry recorded in the Admission/date of birth Register. However, we are unable to persuade ourselves with the line of argument that if no 'declaration form' as per the Rules of 1973 is filled up, it will make the entry recorded in the Admission/date of birth Register as untrustworthy. Putting it differently, if requirement of Section 35 of Indian Evidence Act is satisfied while producing the admission/date of birth certificate, non-compliance of Rules of 1973 will not cause any dent on the entry so recorded in the said registers. The Rules of 1973 requires the parent to declare the date of birth. Neither the Rules of 1973 nor format prescribed therein makes it obligatory to produce any documentary proof in support of such declaration regarding the date of birth. Thus on a mere written declaration of parent, date of birth is required to be reduced in writing in the school Register. In absence of such declaration in the prescribed form as per Rules of 1973, if date of birth is still recorded on the instructions of parents in the admission/scholar/birth Register, no fault can be found in the date of birth so recorded provided such certificate / document is produced in the Court and requirement of Section 35 of Evidence Act are satisfied. Although appellant faintly argued that in the admission / birth Register in the relevant page, signature of school staff is not mentioned, suffice it to say that no such requirement of existence of such signature on

each page of register could be established. No amount of cross-examination was made to establish that Register was either not produced from proper official custody or entry so made was not made in discharge of official duties. Thus, neither the procedure nor the probative value of entry of register can be doubted.

**On Merits :-**

**45.** We have carefully perused the statement of prosecutrix. Her statement inspires confidence. She narrated the incident with utmost accuracy and precision. No amount of cross-examination could cause any dent to her testimony. The MLC and statement of Dr. Ushashri Pandey (PW-5) give further credence to her statement because of definite opinion of sexual assault on her. The FSL report further strengthened the prosecution story. A cumulative reading of statement of prosecutrix, MLC report, statement of Dr. Ushashri Pandey (PW-5) and FSL report, leads us to irresistible conclusion that appellant has committed sexual assault on the victim. In the teeth of Sections 29 and 30 of POCSO Act, there exists a presumption against the accused if foundational facts are established by the prosecution by leading credible evidence.

**46.** The matter may be viewed from another angle. Even for the sake of argument if we accept that victim was not a minor and prosecution could not establish that she was below the age of 18 years, fact remains that the appellant was held guilty for committing offence under Section 376(2)(f) of the IPC. The said provision reads as under:

“(2) Whoever -

(f) **being a relative**, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

**(Emphasis supplied)**

47. The appellant being relative of the victim, could have been sentenced for life in the teeth of aforesaid provision. Thus, even if appellant is able to wriggle out of clutches of POCSO Act, his conviction under Section 376(2)(f) of IPC can become a reason to inflict the sentence of life imprisonment. The punishment in our judgment, is commensurate to the offence.

48. So far, the effect of non-conduction of DNA test is concern, in our considered view, in the judgment of **Rajendra Pralhadrao Wasnik (supra)**, the Apex Court has not laid down that if DNA test is not conducted, the trial or conviction will stand vitiated. In **Dinesh Yadav (supra)** Division Bench of this Court held as under :-

“66. Section 53-A and 164-A of Cr.P.C. makes it obligatory for the prosecution to undertake the exercise of DNA examination. However, we are unable to hold that if the DNA test was not conducted, as a rule of thumb the prosecution story stands vitiated. It depends on the facts and circumstances of each case. In the case of **Krishan Kumar Malik (supra)**, no such principle of law was laid down that non-conduction of DNA examination will vitiate the case of prosecution in all circumstances. For the same reason, we are unable to hold that combined reading

of Section 114(g) of Evidence Act and Section 53(A) Cr.P.C. should lead us to draw adverse inference against the prosecution.

**(Emphasis supplied)**

49. The curtains are finally drawn on this aspect in a recent judgment of Apex Court in **Veerendra v. State of M.P. (2022) 8 SCC**

668. The relevant portion reads as under:-

**“53.** In view of the nature of the provision under Section 53-A CrPC and the decisions referred to, we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the court has still a duty to consider whether the materials and evidence available on record before it, are enough and cogent to prove the case of the prosecution.”

**(Emphasis supplied)**

50. In view of foregoing analysis, in our opinion, the prosecution could lead credible evidence and prove beyond reasonable doubt that appellant is guilty for committing aforesaid offences. Thus, we do not find any infirmity or illegality which warrants interference by this Court.

51. Appeal fails and is hereby **dismissed**.

**(SUJOY PAUL)  
JUDGE**

**(ACHAL KUMAR PALIWAL )  
JUDGE**

PK