

Loopholes in Determining Age Under Protection Of Children From Sexual Offences (Pocso) Act, 2012

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ABSTRACT

When it comes to the cases which involves a minor as a victim or an offender, age determination is of paramount importance to ascertain the applicability of relevant statute. When an offender is tried under the Juvenile Justice (Care and Protection) Act, 2015, age determination has its importance as after ascertaining the age the trial begins.

Similarly, when the victim under the POCSO Act lodges a complaint, it is of supreme importance that at the initial stage of trial, the determination of age of the victim is done. For if the victim is a child under section 2 (d) of POCSO Act, only then the POCSO Act shall be applicable. Evidently there is no procedure prescribed under the POCSO Act by the legislature in respect to determination of age, it became difficult to ascertain the age of the child victim, which is the basis to decide whether the accused be given punishment under the special law which is a strict one or be punished under the Indian Penal Code for committing sexual crime. The Judiciary thus came up with the idea to apply the procedure of determining the age as mentioned in the JJ Act, 2015. Though the procedure mentioned therein is for a child in conflict with law or minor who is in need of care and protection. Now the scenario is that the very initial as well as the most important aspect of the trial under the POCSO Act, 2012 is in vacuum by not providing the procedure for ascertainment of age of the victim to decide whether or not the case falls under the purview of POCSO Act, 2012. This paper is a review of the practices adapted by different courts of law to determine the age of the victim and the interpretations done where no definite procedure is mentioned, discussing about the problem and probable solution to the same.

Keywords: child victim, Protection of Children from Sexual Offences Act, 2012, determination of age, age of minor victim, child sexual abuse.

INTRODUCTION

The POCSO Act, 2012 was passed to strengthen the legal provisions for protection of children from sexual abuse and exploitation. Such protection to the child is guaranteed for the first time under this Act in India and the related offences being dealt and defined clearly under the Act.

The Act also defines a child as any person below the age of 18 years, thus, providing protection to all the children below the age of 18 years from the offences such as, sexual assault, sexual harassment and from the acts related to pornography.

The punishments range from simple to rigorous imprisonment of varying periods. Provisions for fine are also there which is decided by the discretion of the concerned court. An offence is treated as 'aggravated', when committed by a person in position of trust or by a person who is not expected to perform any such immoral or illegal act or by person in authority of child such as member of security forces, police officer, public servant, etc. though does not mention the process of determination of age of the prosecutrix/victim.

The POCSO Act, 2012, applies to the cases where a child under the definition of this Act suffers an offence of sexual abuse also defined and enumerated under the Act. Role of determination of age thus becomes very important in deciding whether the case shall fall under the POCSO Act, 2012 or will be tried under the Indian Penal Code, 1860.

The sole reason why a case is tried under the POCSO Act, 2012 is because the victim is found to be a minor or a child and whose age is below eighteen years. Though this age was amended by an Amendment Act of 2015 to eighteen years which earlier was sixteen years. Hence from 2015 a child would be a person below the age of eighteen years. The definition of Child is defined under the section 2(d) of the POCSO Act.

DETERMINATION OF AGE

A victim if is subjected to any sort of sexual offences, be it, penetrative sexual assault, sexual abuse, sexual harassment or aggravated form of any of the aforesaid mentioned, is governed by POCSO Act, 2012. To punish a culprit of such a heinous crime of sexually abusing a minor has to be given harsh punishment for deterrence in return of the monstrous offence

committed. But the catch is that POCSO Act, 2012 shall only apply to the cases where the victim is a minor and falls within the definition of “child” under POCSO Act, 2012.

Thus, at the very outset, the Hon’ble Court starts with determining the age of the victim which then decides which Act is to be applied on that particular case.

To fill up the lacuna the Hon’ble Apex Court came to the rescue and held that when such question as to the age of victim arises, the procedure provided in the JJ Act, 2015 shall apply, which was also followed by all the Courts in India for determination of age.

For the first time in *Jarnail Singh v. State of Haryana*¹ where the case was of kidnapping and rape of a child and age of the prosecutrix was in question, the Hon’ble Supreme Court held that, “The manner of determining age (of a minor) conclusively has been expressed in Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basic out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding Sub clause, it has overriding effect over an option expressed in a subsequent Sub clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. 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 the 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. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical option.

¹*Jarnail Singh v. State of Haryana* (2013) 7 SCC 263 (Para 22 and 23) See also, *Sunil v. State of Haryana* (2010) 1 SCC 742: (2010) 1 SCC (Cri) 910

Even though Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, it would be just and appropriate to apply Rule 12(3) of the 2007 Rules, to determine the age of the prosecutrix PW6 (the victim of kidnapping and gang rape) in the instant case.”

A. INSTANCES OF AGE DETERMINATION

1. Official documents or school registers relied upon

Rajkumar v. State of Madhya Pradesh,² was a brutal case of rape and murder, the accused was an acquainted person as he was a neighbour to the accused. The question arose of the age of the prosecutrix. The school register and statement of the father of the deceased victim stated that she was 14 years old. The same was mentioned in the FIR. So far as medical evidence is concerned, she was expected to be of 16 years of age. But as the documents were found genuine and matched the evidences of the witnesses, the same prevailed over the medical evidence and the victim was held to be a minor.

2. School registers held not to have evidentiary value

In *Birad Mal Singhvi v. Anand Purohit*³ that an entry relating to date of birth made in a school register is not of much evidentiary value to prove the age of the person in the absence of material on which age was recorded.

3. School registers having date of birth and other documentary evidences relied upon

In, *State of Madhya Pradesh v. Ajab Singh*⁴ which was a case of false promise of marriage, kidnapping and rape of the prosecutrix; where the question arose of the age of the prosecutrix, the Apex Court held that the trial court’s finding on the age was correct. The trial court relied upon the transfer certificate of the school where the prosecutrix had undergone her education along with the school registers which held her date of birth on

²*Rajkumar v. State of Madhya Pradesh* (2014) 5 SCC 253

³*Birad Mal Singhvi v. Anand Purohit* 1988 Supp. SCC 604 (Para 15) See Also, *State (Govt. Of NCT of Delhi) v. Charan Singh* 2017 SCC Online Del 8186 (Para 16-21); *State (NCT of Delhi) v. Mohd. Irfan* 2017 SCC Online Del 9111 (Para 12-15)

⁴*State of Madhya Pradesh v. Ajab Singh* (2015) 13 SCC 383

record. Considering the findings of the trial court correct on the point that the prosecutrix was minor and less than 16 years of age at the time of incident, the Apex Court upheld the decision of trial court setting aside the judgement of High court, thus convicted the accused as prescribed as the question of consent does not arise since victim being a minor.

4. Date of birth when recorded on presumption have no evidentiary value

In the case of *Rabiya Bano v. Rashid Khan*⁵ the Hon'ble Court decided the following, "No ossification test was conducted by the doctor which would establish the characteristic, fusion of bones, proof of date of birth, etc. to determine the age of the prosecutrix. Hence, we find that the date of birth of the prosecutrix was recorded by her mother in school records is based on presumption, hence it is not found reliable. Accordingly, the documents on record could not be relied upon and prove the age of the prosecutrix was less than 18 years at the time of incident."

5. Certified copy of birth certificate not relied upon

In *Lal Bahadur Kami v. State of Sikkim*⁶, the prosecution projected the age of the victim to be 17 years and 8 months. In order to prove age of the prosecutrix, the prosecution produced the Birth Certificate issued by Chief Registrar Birth and Death Family Welfare Department. The Trial Court relying on Rule 12 of Juvenile Justice Care and Protection Act, held the victim to be minor. The High Court while hearing the appeal against the conviction held that the Birth Certificate cannot be relied in isolation. No record was produced by the prosecution on the basis of which birth certificate was issued by the Registrar. Neither the mark sheet nor the admission register was produced therefore in the absence of the record on the basis of which the certificate was issued the High Court held that the prosecution could not prove that victim was minor.

6. Photocopy of the Birth certificate not relied upon

In *State of Sikkim v. Amit Darjee*⁷ the High Court was considering an appeal against judgment of acquittal wherein the victim was allegedly aged 16 years. To prove the age of the victim a photostat copy of the birth certificate was filed which was attested by

⁵ *Rabiya Bano v. Rashid Khan* 2017 (3) MPLJ (Cri.) 649 (Para 9, 10 and 13)

⁶ *Lal Bahadur Kami v. State of Sikkim* 2018 Cri.L.J. 439 (Sikkim HC)

⁷ *State of Sikkim v. Amit Darjee* 2016 Cri.L.J. 523 (Sikkim HC)

Registrar Birth and Death. However, the Court did not place reliance on the certificate since neither original certificate was produced nor certified copy of the certificate was produced. The Court further held that even the attested copy was not properly proved since it was a photostat copy therefore the same was inadmissible in evidence. According to it was held by the High Court that victim cannot be held to be minor.

LACUNA IN THE PROCEDURE OF AGE DETERMINATION

India being a diverse country, there are varied differences between the level of education, awareness in different regions. Such differences can be witnessed in same region of the country too. When the parameters of the determination of age is spoken about, it needs certain accurate documentation to adjudge the age of the victim which then forms the basis of the case. Such accurate need of documentation of age from the rural area becomes a great deal in comparison to urban areas.

In the rural areas, the record of age is generally on the wishes of the parent or the guardian. The age such recorded, if at the time of admission of the child with the school is done by increasing the age of the child, later becomes fatal for the child in case he/she becomes victim of child sexual abuse. And if the age is recorded by decreasing the same, in such cases it becomes fatal for the accused as in many cases, the benefit of doubt is given to the victim in cases of child sexual abuse. In rural areas, under the clutches of unawareness, toxication, male chauvinism, marital rape, want of son etc., the female is forced to give birth to multiple babies, the parents here tend to forget the age of the children, proper documentation of birth here being along-lived dream. And sadly, this remains the story of the majority of rural parts of India.

As according to the section 94 of the Juvenile Justice (Care and Protection) Act, 2015 Act which replaces the Rule 12 of the Juvenile Justice (Care and Protection) Act, 2007 in the amendment, there is a series of documents to be considered by the court of law as proof of age to determine the age of the victim which is in doubt. They are: -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board,

- (ii) if the above-mentioned document not available then, 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 mentioned requirements, 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. Also, that such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

Thus, the following can be the difficulties in determination of age of the victim concerning the cases of child sexual abuse: -

- (i) One of the major drawbacks in the POCSO Act is that the definition of 'child' does not include mentally retarded victims although are above 18 years but mentally are much below of 18 years. There has been umpteen instance where mentally retarded victims were subjected to sexual abuse, since for all good purposes they are child, therefore they should be held to be 'child' under the definition. In one such circumstance before the Hon'ble Apex Court, in the case of *Eera v. State (NCT of Delhi)*⁸, this point was considered but since penal statutes are construed strictly therefore due to the lacuna in the statute Hon'ble Apex Court held that age in POCSO Act will only mean physical age and not mental age.
- (ii) Non availability of birth certificates of the children so concerned belonging to the rural areas,
- (iii) The school registers have record of age as told by the person accompanying the child at the time of admission of the child in the school, which is uncertain to be accurate in majority cases.
- (iv) Concerning the municipal authority or the panchayats, the record here is also made as told by the guardian or the parents. Also due to poor record holding and maintaining system and facilities in the rural areas, these documentations are hard to be relied on in such serious cases and heinous crime of child sexual abuse.

⁸*Eera v. State (NCT of Delhi)*(2017) 15 SCC 133

(v) Such authorities do not insist on proof of the date of birth like document from hospital etc., before recording the same in the government records. They have their own reasons as there is a rare arrangement of such documents in the primary health centre or nursing homes in the rural areas.

When the case comes to the phase where there is no document available, and an ossification test is needed to determine the age of the victim, the test though determines the age, but it gives a margin of two years up and down to the age so determined. This again makes the case uncertain as there is no accuracy to the determination of age by medical examination too. Age determination procedure by the medical examination is a very difficult inspection. Science in this respect does not show exact result and the medical opinion can be given in a range of age and not with certainty. What if the medical opinion suggests the age between 16 – 18 years? Taking the upper two years limit, the case falls under the POCSO Act but if the lower two years limit is taken, the case shall be tried under the POCSO Act. In both the cases, either the victim shall suffer or the accused, for if the upper limit is taken, the accused will be set free from the clutches of POCSO Act and if the lower limit is taken even if the victim is not under 18 years of age, the accused shall be tried under the stringent procedures of the POCSO Act.

(vi) The problems, confusions and discrepancies between the evidences to prove the documents presented as proof of age, results in major issues in determination of age. If there lie minor discrepancies in the evidences so produced then the courts tend to overlook them and convicts the accused. Whereas, if the court finds major discrepancies in the evidences to prove the age of the victim, the benefit of doubt is given to the accused. Some illustrations of the same is presented below in tabulation.

Sl. No	Case	Nature of document for age determination	Remark
1.	State of M.P. v. Preetam [(2018) 17 SCC 658]	School records relied rather than medical evidence	Victim held to be minor
2.	Sandeep Tamang v. State of	Birth certificate not	Benefit of doubt to

	Sikkim [2016 CriLJ 4706 (Sikkim)]	authentic	accused
3.	Rajkumar v. State of Madhya Pradesh [(2014) 5 SCC 253]	School record prevailed over medical evidence	Victim held to be minor
4.	Subramaniam v. State [Cri.L.J 946 (Madras HC)]	Birth certificate, school records and medical evidence all concluded same	Victim held to be minor
5.	Lakhi Ram Takbi v. State of Sikkim [2019 Cri.L.J. 2667]	School record and birth record relied even if it was recorded when victim was 15 months	Victim held to be minor
6.	Rajinder Kumar v. State of Himachal Pradesh [2019 Cri.L.J. 2839 (HP HC)]	Birth certificate and school record relied	Victim held to be minor
7.	Bholu Khan v. State of NCT of Delhi & Ors. [2013 (3) Crimes 549 (Del.)]	Ossification test relied when doubt on documents	Victim held to be minor
8.	Birad Mal Singhvi v. Anand Purohit [1988 Supp. SCC 604]	School records held not of evidentiary value	Benefit of doubt to accused
9.	State of M.P. v. Ravi @ Ravindra and Anr. [2017(1) M.P.L.J.(Cri.) 150]	Doubt on authenticity of the school records	Benefit of doubt to accused
10.	Rabiya Bano v. Rashid Khan [2017 (3) MPLJ (Cri.) 649]	Non- availability of birth certificate, doubt on school record	Benefit of doubt to accused
11.	State of M.P. v. Munna [2016 (1) SCC 696]	Documents not relied or proved	Benefit of doubt to accused
12.	Murugun @Settu v. State of Tamil Nadu, State Rep. By Inspector of Police, Tamil Nadu	Birth certificate and school record varied; birth certificate relied	Victim held to be minor

	[AIR 2011 SC 1619]		
13.	Lal Bahadur Kami v. State of Sikkim [2018 Cri.L.J. 439 (Sikkim HC)]	Birth certificate not relied in isolation	Benefit of doubt to accused
14.	State of Sikkim v. Girjamanrai @ Kami [2019 Cri.L.J. 4247 (Sikkim HC)]	Birth certificate not proved to be authentic	Benefit of doubt to accused
15.	State of Sikkim v. Amit Darjee [2016 Cri.L.J. 523 (Sikkim HC)]	Photocopy of birth certificate not proved to be authentic	Benefit of doubt to accused
16.	Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546]	Difference in age in different document	Victim held to be minor
17.	Ramswarup v. State of M.P. [2013 (2) M.P.L.J. (Cri.) 374]	Doubt in age proof documents	Benefit of doubt to accused
18.	Ramesh @ Dabbu v. State of M.P. [M.P.2014 (III) MPJR 146]	School registers not authenticated	Benefit of doubt to accused
19.	Arman Ali v. State of M.P. [ILR [2012] M.P. 2817]	School documents not authenticated	Benefit of doubt to accused

RECOMMENDATIONS AND CONCLUSION

Recommendations

From the study and the research on the determination of age and its major problems adjudicating the cases, the main problem which crops up is the non-availability of concrete document to prove the date of birth or the age of the victim. Following are the recommendations which can be helpful to do away the crisis.

- (i) Need to create a granule database in the rural areas of the country in relation to the date of birth of each child.
- (ii) The recording system of the database and maintaining of the same shall be adequate, systematic and reliable.

- (iii) Anganwadis working on the nutrition and education of the child, should be given authority of maintaining the birth details of each child in the jurisdiction as it is only this branch of the government which has maximum reach to the rural area of the country.
- (iv) Also, that such database must be updated on a regular basis.
- (v) An open data platform must be created in regular intervals to help the authority so delegated to enter the data which should not be restricted to but shall include the birth information and data of crime against child in the particular region.
- (vi) Our database should be made so stringent that we do not require to take help of the last resort i.e. the medical examination of the child to prove his/her age.
- (vii) There is a need to have a specific provision for determination of age under the POCSO Act, 2012.
- (viii) The definition of child should be widened so as to include the mental age of the child.

Conclusion

Thus, it is concluded that though there is no specific procedure mentioned in the POCSO Act, 2012 in respect to the determination of age, it is procedure of JJ Act, 2015 which is applied. Also, various other procedures are adapted by the courts of law to meet varied facts and circumstances of the case. It is the interpretation of various courts which determines or ascertain a particular evidence to be a decisive one in a case to meet the ends of justice and to see to it that not a single case is left without turning the stones to render complete justice. By adapting the above-mentioned procedure, the Hon'ble Apex Court eradicates the lacuna in the POCSO Act, 2012 in relation to determination of age of the victim subjected to the sexual offence. But again, the point to worry is that the vacuum still persists as interpretation is not a definite law. Enacting a law makes it definite and still, with no scope of interpretation and variation in cases.

In our country when we talk about availability of such documents as mention in the section 94 of JJ Act, it is to be kept in mind that the majority percentage of the Indian population who stays in rural areas, rarely possess documents or proof of age for the children. Talking about the birth certificates, many would not know about this document and that it has an importance. Schooling is a dream to many of the children residing the rural areas. This makes

it difficult to produce the evidence of age through school registers and mark sheets. Next in line comes the medical examination and conclusion of age by ossification test or any method latest developed. As of now it is the ossification test which is being practiced for the determination of age. This ossification test too is not an accurate test for the determination of age. Not in majority but there are many cases where the benefit of doubt is given to the accused for have not ascertained the victim to be minor as the ossification test gives a margin two years up and down to the determined age of the victim as per the test. In such circumstances when the age of the victim is not proved beyond doubt, it is the victim who suffers and the accused is benefitted of the system by getting benefit of doubt and being acquitted of allegations of such a heinous crime.

Also, the lacuna that the mental age of the victim is not included in the physical age of the definition of 'child', results in true justice being a dream for the victims of sexual abuse who by their mental age are still a child.

These drawbacks, lacunas and vacuum should be bridged for delivery of justice and to fulfil the very purpose of the POCSO Act, i.e., to render utmost justice to the victims of crime of child sexual abuse, one of the most horrendous of crime known to the mankind.

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