HIGH COURT OF KARNATAKA

Bench: Justices Sreenivas Harish Kumar and C.M. Joshi

Date of Decision: June 14, 2024

Case No.: CRIMINAL APPEAL NO. 1247 OF 2018

APPELLANT(S): Manikanta @ Puli (Now in Judicial Custody, Central Prison) …..Appellant

VERSUS

RESPONDENT(S): 1. State of Karnataka by Chikkamagaluru Rural Police, Chikkamagaluru

2. Smt. G.C. Sushmitha …..Respondents

Legislation:

Sections 376(2)(i)(n), 506 of the Indian Penal Code (IPC)

Sections 5(j)(ii)(l) and 6 of the Protection of Children from Sexual Offences Act (POCSO Act)

Section 313 of the Code of Criminal Procedure (Cr.P.C.)

Sections 35, 62, 63, 65, 74, 77, 78, 114€ of the Indian Evidence Act, 1872

Section 34 of the POCSO Act

Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015

Section 293 of the Cr.P.C.

Section 357 of the Cr.P.C.

Subject: Criminal appeal challenging the conviction for sexual assault on a minor, focusing on the evidentiary value of the school admission register extract, applicability of Section 162 Cr.P.C., and the implications of Section 313 Cr.P.C.

Headnotes:

Evidentiary Value of School Admission Register –

Accused argued that Ex.P8, the extract of the school admission register, lacked evidentiary value as the author was not examined – Prosecution contended Ex.P8 is a public document under Section 74 of the Evidence Act, and secondary evidence of a public document can be produced under Section 65€ – Court held that Ex.P8, issued by the headmaster (PW5), was admissible as secondary evidence, satisfying Section 63 of the Evidence Act – Argument that PW5 was not the headmaster when the admission was recorded rejected – Court found Ex.P8 credible and sufficient to prove the age of PW1 as below 18 years, invoking the provisions of the POCSO Act [Paras 1-24].

Applicability of Section 162 Cr.P.C. –

Defense claimed Ex.P8 was inadmissible under Section 162 Cr.P.C. – Court held that Section 162 applies to statements made during investigation by persons acquainted with the facts of the case – Ex.P8, being an extract of the admission register, was not a statement made under Section 161 Cr.P.C. – Court distinguished Ex.P8 from information relating to the crime, thus not attracting Section 162 Cr.P.C. – Defense arguments regarding Vinod Chaturvedi and Kali Ram cases rejected [Paras 25-27].

Section 313 Cr.P.C. Examination –

Defense argued the conviction was vitiated as the age of the victim was not highlighted during Section 313 Cr.P.C. examination – Court observed that the age of the victim alone is not incriminatory; the fact of sexual assault on a minor is – Court found the incriminating circumstances were adequately brought to the accused's notice – Any lapse at Section 313 stage considered curable by appellate court [Paras 28-29].

Findings on DNA Report and Conviction –

Defense contested the DNA report (Ex.P17) for lack of examination of the scientific officer – Court noted Section 293 Cr.P.C. allows the use of expert reports as evidence without examining the expert unless necessary – DNA report confirmed the accused as the father of PW1's child, corroborating the sexual assault – Conviction under Section 6 of the POCSO Act upheld, but sentence modified due to lack of reasons for imposing life imprisonment – Accused sentenced to 10 years rigorous imprisonment and fine [Paras 30-31].

Decision – Appeal partly allowed – Conviction under Section 6 of the POCSO Act confirmed – Accused acquitted of Section 506 IPC – Sentence modified to 10 years rigorous imprisonment with fine of Rs.25,000/- – Compensation ordered to be paid to PW1 from fine amount – Legal services committee to compensate amicus curiae [Para 31].

Referred Cases:

- P. Yuvaprakash v. State represented by Inspector of Police, 2023 SCC Online SC 846
- Alamelu and Another v. State rep. by Inspector of Police, AIR 2011 SC 715
- Sunil v. State of Haryana, AIR 2010 SC 394
- State of Madhya Pradesh v. Munna, AIR 1989 SC 218
- Narbada Devi Gupta v. Birendra Kumar Jaiswal, AIR 2003 SC 2301
- Umesh Chandra v. State of Rajasthan, AIR 1982 SC 1057
- Harpal Singh and Another v. State of Himachal Pradesh, AIR 1981 SC 361
- Shyam Lal @ Kuldeep v. Sanjeev Kumar and Others, AIR 2009 SC 3115
- Mahadeo v. State of Maharashtra, 2013 14 SCC 637
- Vinod Chaturvedi and Others v. State of Madhya Pradesh, 1984 SCC (Cri) 250
- Kali Ram v. State of Himachal Pradesh, 1984 SCC (Cri) 250

Representing Advocates:

For appellant: Sri. Hashmath Pasha, Senior Adv. For Sri. Nasir Ali, Adv.

For respondents: Sri. Vijaykumar Majage, SPP-II a/w Smt. R.Sowmya, HCGP, for R1; Smt. K.M.Archana, Adv. Appointed as amicus curiae for R2.

JUDGMENT

The accused has stood convicted for the offences punishable under sections 376 (2) (i)(n) and 506 of Indian Penal Code ('IPC' for short), and section 6 of the Protection of Children from Sexual Offences Act ('POCSO Act' for short) and sentenced to life under section 6 of the POCSO Act, and simple imprisonment for one year with fine of Rs.5,000/- for the offence under section 506 IPC. The argument of Sri Hashmath Pasha, learned senior counsel, gives rise to following questions to be answered :

i. Does Ex.P.8, the extract of School Admission Register fall short of evidentiary value for not examining the author of admission register? ii. Is Ex.P.8 hit by section 162 of Cr.P.C.?

iii. Is conviction of the accused vitiated for not drawing his attention to the age of PW1 when he was examined under section 313 Cr.P.C.?

2. Before answering the above questions, briefly the incident that led to prosecuting the accused may be stated here. PW1 developed acquaintance with the accused when she was a student of 5th standard as the latter used to visit the house of her neighbour viz., Yashodha. 16.06.2016 was her birthday (annual). Around 6.00 p.m. on that day accused went to the house of PW1 and took her to his house stating that there was a *pooja* in his house. There was nobody in the house of the accused when PW1 went there. The accused took her inside a room of his house and subjected her to intercourse. As she screamed, accused gagged a piece of cloth into her mouth. He repeatedly subjected PW1 to intercourse throughout night. On the next day morning when she was about to leave his house for her house, she was threatened to be killed if she would disclose the incident to anybody. Thereafter the accused had intercourse with her five or six times and threatened of killing her family members if she would disclose

the same to anyone. When she started fainting in the school, the teacher informed of it to her mother. The medical checkup revealed that PW1 had become pregnant and at that time she disclosed everything. In this regard FIR was registered on 20.12.2016. PW1 gave birth to a female baby. The DNA test conducted during investigation confirmed that the accused was the father of the baby born to PW1.

3. The prosecution examined 11 witnesses and relied on 19 documents, Ex.P.1 to P.19 to prove its case. The trial court has of course referred to the evidence of all the witnesses, but in regard to age of PW1, there is no discussion at all. It appears that the defence did not make it a point of argument before the trial court in the way it was made a prominent point of argument before us. Since the age is a deciding factor to invoke any of the offences under the POCSO Act, point no.1 requires to be answered.

4. It is the argument of Sri. Hashmath Pasha that in spite of the fact that the prosecution produced Ex.P.8, admission register extract, and examined PW5 to prove it, it cannot be said that the prosecution was able to prove the age of the girl as 14 years on the first day of incident i.e., 16.06.2016. Ex.P.8 was marked through PW5 and thus a document was brought on record. It only amounted to producing a document in the course of trial and it did not amount to proving a document. He argued that mere marking of a document would not amount to proving it. Ex.P.8 is an extract of admission register maintained at the school. PW5 was not the author of the original admission register. In this view the author of the admission register should have been examined by the prosecution to prove the age of PW1. Elaborating on this point he argued that Ex.P8 is just an extract of admission register; it cannot be considered as a certified copy of a public document; PW5 may be author of Ex.P8, but since he is not the author of the admission register at the time when PW1 was admitted to school, his evidence is of no importance. He referred to some judgments of Supreme Court which will be referred to later.

5. Sri. Vijaykumar Majage, learned SPP-II for respondent no.1 argued that Ex.P8 is an extract of school admission register which is a public document within the meaning of section 74 of the Indian Evidence Act (‘Evidence Act’ for short). In this view production of its

extract suffices the requirement of proof as public document need not be produced before the court. PW5 was the headmaster of the school who issued Ex.P8 and purpose of examining him during trial was to prove the age of the girl. In Ex.P8 the date of birth of PW1 is clearly written as 16.06.2004. His clear evidence before the court is that the police requested him by making a written request as per Ex.P7 to issue a letter confirming the date of birth of PW1 and on the basis of the information available in the school documents, he issued Ex.P8. PW5 is the headmaster of a Government Higher Primary School and therefore the admission register was a public document. Ex.P8 is the extract of the public document. It was not necessary that the prosecution should have examined the headmaster or any other official who entered the date of birth of the girl in the admission register when she was admitted to school. Not only in Ex.P8, but there are also other documents such as Ex.P3 – statement of PW1 under section 164 Cr.P.C. and Ex.P11 medical examination report where the age of PW11 is mentioned as 14 years. In this view PW1 was a girl of 14 years when she was subjected to forcible sexual intercourse by the accused. Ample proof is available as regards her age.

6. Smt. K.M.Archana, learned counsel for respondent no.2 also argued that Ex.P8 is an extract of the public document maintained at Government School. Section 74 of Evidence Act is squarely attracted. In addition, the entries made in the admission register should be presumed to be correct in view of section 114(e) of the Evidence Act. Whenever evidence as regards a public document is to be given, production of its extract issued by competent authority or certified copy is enough and this production itself amounts to proof, it is not necessary that the author of the public document should be examined and it is not the requirement of law also. She referred to section 94 of the Juvenile Justice (Care and Protection of Children) Act ['JJ Act' for short] which envisages the procedure for proving the age of the child. Section 34 of the POCSO Act states that the provisions of JJ Act can be followed for determination of age. Ex.P.8 is in conformity with section 34 of the POCSO Act. She also argued that the date of birth mentioned in Ex.P8 is not controverted by the defence while cross examining PW5. When this point was not argued before the trial court, it cannot be raised in the appeal for the first time.

7. Sri. Hashmath Pasha replied that PW5 was given a suggestion that 16.06.2004 was not the date of birth of the girl and thereby the age of the girl was disputed during trial.

8. On this point it is to be stated that necessarily the court trying the offences under the POCSO Act is required to give a finding in regard to age of the victim as the provisions of the POCSO Act can be applied only if the victim is a child. Section 2(d) of the POCSO Act defines the child as a person below the age of 18 years. If a question arises in regard to age of the victim, especially when the age of the victim borders the upper cap of 18 years it is mandatory for the court to give a finding in regard to age in terms of section 34 of the POCSO Act which states as follows :

"34. ***Procedure in case of commission of offence by child and determination of age by Special Court***.—*(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].*

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."

9. Sub-section (1) of section 34 is applicable when the offence is committed by a child. Sub-section (2) is more comprehensive in the sense that it deals with determination of age by the Special Court when a question arises whether a person is a child or not. This sub-section applies to determine the age of an accused who is a child and of a child victim. Sub-section (3) makes it very clear that the order passed by the Special Court determining the age of the person in accordance with sub-section (2) does not become invalid by production of a proof subsequently to the effect that the age determined

under sub-section (2) is not correct. That means the order of Special Court attains finality.

10. There are judicial pronouncements holding that the provisions of JJ Act may be followed by the Special Court for determination of age. In ***P. Yuvaprakash Vs. State represented by Inspector of Police***[1] the Hon'ble Supreme Court by referring to section 34 of the POCSO Act and section 94 of the JJ Act, 2015 has held as below:

"13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires

1 2023 SCC Online SC 846

consideration is that the concerned court has to determine the age by considering the following documents:

"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".

11. Now the actual point of argument of Sri Hashmath Pasha 'mere production and marking of a document does not amount to proof' is to be dealt with. There are two types of documents – public and private. Section 74 of the Evidence Act specifies public documents and section 75 of the Evidence Act states that all other documents are private documents. To make it more clear all documents not being public documents are private documents. The best way of proving a private document is by production of document itself, and it is called

primary evidence in terms of section 62 of the Evidence Act. A public document may be proved in the manner specified in sections 77 and 78 of the Evidence Act. Section 65 of the Evidence Act deals with circumstances when secondary evidence of a private document can be produced, and it also states that secondary evidence of a public document can be produced. Section 63 of the Evidence Act gives the inclusive meaning of secondary evidence.

12. The reason why production of certified copy of a public document suffices the situation is quite obvious. It is on the ground of convenience. And as it contains entries of several transactions of day to day business of a public office, production of an authenticated copy of a particular transaction in the nature of extract of the public document appears to be not only practical, but also reasonable and wise. It is also not necessary to summon the person who has made entries in a public document in the capacity of a public servant, for section 77 of the Evidence Act clearly states that certified copies may be produced in proof of contents of the public document or parts of the public documents of which they purport to be copies. The language of section 77 is so clear and plain that mere production of certified copy amounts to proof. This kind of proof is not without any reason, it is in the background of the fact that the officer who has made entries may or may not be available to come over to court to depose in regard to the entries made by him. Moreover section 114 (e) of the Evidence Act provides for presuming that the judicial and official acts have been regularly performed. The entries in a public document are made while discharging official functions and thereby a sanctity is attached to a public document. This is how proof of a public document is required to be made.

13. Now we refer to the decisions cited by Sri Hashmath Pasha. In ***Alamelu and Another Vs. State rep. by Inspector of Police***[1], age of the girl was in question and it was sought to be proved by production of transfer certificate. The Hon'ble Supreme Court found that the age of the girl could not have been fixed by the court on the basis of transfer certificate for the

[1] (2011) 2 SCC 385

main reason that the headmaster who issued the transfer certificate was not examined.

14. In the case of ***Sunil Vs. State of Haryana***[2] school leaving certificate was produced in proof of the age. The prosecutrix attended the school only for 100 days and she was admitted to the school by her brother Ashok Kumar who was not examined before the court. The girl's father who was examined in the court gave the approximate age of his daughter. The doctor who clinically examined the girl found well development of secondary sex characters in the girl and she referred her to a dentist and a radiologist for verification. But the girl was not taken before them. In view of all these attending factors, the date of birth as mentioned in school leaving certificate was disbelieved.

15. In State of ***Madhya Pradesh Vs. Munna***[3] the age of the girl was sought to be proved by producing school certificate. The girl was also referred to ossification test, but the doctor who conducted the test was not examined. The mother of the girl was not able to give the exact age of the girl. These were the reasons for not placing reliance on the school certificate.

16. A judgment of the Supreme Court in a civil appeal in the case of ***Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and another***[4] deals with marking of rent receipts. It is held by the Hon'ble Supreme Court that mere production and marking of a document as an exhibit is not enough.

17. The decisions in ***Alamelu, Sunil and Munna*** show deficiency in proof based on factual position therein. In ***Narbada Devi***, rent receipts were in question, and
since they are private documents, their mere production was rightly held to be inadequate proof.

18. But there are a few other judgments of the Hon'ble Supreme Court where it is clearly held that a document issued by school in proof of age becomes relevant under section 35 of the

[2] ((2010) 1 SCC 742
[3] (2016) 1 SCC 696
[4] (2003) 8 SCC 745

Evidence Act. ***In Umesh Chandra vs. State of Rajasthan***[5] the clear observations are as below:

"10. ……...The High Court seems to think that the admission forms as also the School's register (Ext. D-3) both of which were, according to the evidence, maintained in due course of business, were not admissible in evidence because they were not kept or made by any public officer. Under Sec.35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under sections 34, 73 or 74 but which were admissible under Sec.35 of the Evidence Act which may be extracted as follows:

"35. Relevancy of entry in public record made in performance of duty - An entry in any public or other official book, 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 specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact."

(Emphasis ours)

19. ***Harpal Singh and Another Vs. State of Himachal Pradesh***[6] is also a case where age of the prosecutrix emerged as a dispute and a certified copy of the birth register was produced. Holding that kind of proof being sufficient, it is observed as below:

"3……...There is yet another document, viz, Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on 11-11-1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was

[5] AIR 1982 SC 1057
[6] AIR 1981 SC 361

inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author……..."

20. In ***Shyam Lal @ Kuldeep Vs. Sanjeev Kumar and Others***[7] the admissibility of school leaving certificate was an issue and it is held that such a document falls within the ambit of section 74 of the Evidence Act and is admissible without formal proof. The following are the observations:

[7] AIR 2009 SC 3115

"24. One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ex.P.2, the School Leaving Certificate. The learned District Judge, while dealing with this documents has observed:

"on the other hand, there is a public document in the shape of school leaving certificate Ex.P.2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded son of Shri Balak Ram."

25. The findings of the learned District Judge holding Ex.P.2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence. It has been held in Dasondha Singh and Others v. Zalam Singh and Others [1997(1) P.L.R. 735] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof."

(emphasis supplied)

21. Sri. Vijaykumar Majage, SPP-II has placed reliance on the judgment in ***Mahadeo Vs. State of Maharastra***[9] where the school leaving certificate and admission form containing date of birth were relied on in proof of the age of the prosecutrix. In Para 13 it is held as below:

"*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

[9] 2013 14 SCC 637

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."

22. From the conspectus of the above decisions, it can be very well concluded that the proposition, "mere production and marking of a document does not amount to proof" holds good in respect of private documents only, and the same view cannot be taken in respect of proof of public documents.

23. Ex.P8 is extract of school admission register issued by PW5 in the capacity of headmaster of the school. It is not the case of the appellant that Ex.P8 is not the extract of admission register, what is contended is that PW5 is incompetent to speak to the contents of Ex.P8 because he was not the headmaster at the time when PW1 was admitted to school. This argument cannot be accepted, for being the headmaster of the school and custodian of the admission register he was authorized to issue its extract pertaining to PW1. He is a competent witness to speak to the contents of Ex.P8 which satisfies the definition of secondary evidence within the meaning of section 63 of the Evidence Act. Section 65 (e) of the Evidence Act states that secondary evidence may be produced when the original is a public document within the meaning of section 74 of the Evidence Act. Ex.P8 is undoubtedly an extract of school admission register. PW5 being the headmaster of the school and custodian of the register vouched to the contents of Ex.P8. Except a suggestion that 16.06.2004 was not the date of birth of the girl, PW5 is not discredited in any way. He is a competent witness. He may not be having personal knowledge of the date of birth of PW1, but his evidence cannot be discarded because of this reason. The entries made in the school admission register cannot be disbelieved. If for any reason the accused knew that 16.06.2004 was not the correct date of birth of PW1, he could have disproved Ex.P8 by producing any evidence available with him. The investigating officer should have been questioned in the cross examination. Moreover no objection was taken when Ex.P8 was marked before the Special Court.

24. However in ***Yuvaprakash (supra)*** it is observed in para 19 of the judgment that the transfer certificate or extract of admission register are not what section 94(2) (i) of JJ Act, 2015 mandates nor they are in accord with the said section. This observation appears to have been made in the given set of facts and circumstances of that particular case. It may be stated here that "date of birth certificate from the school" as mentioned in section 94 (2)(i) of JJ Act takes the meaning that it is none other than extract of admission register where date of birth finds a place. It is doubtful that the schools maintain a separate register for entering the date of birth of the students and therefore if at all the school authority is required to issue a document relating to date of birth of a student, it is issued on the basis of entry of the date of birth made in the admission register. In this view Ex.P8 which stands fortified from the evidence of PW5 does not fall short of evidentiary value and it can be very much acted upon. For all these reasons the argument of Sri. Hashmath Pasha that Ex.P8 is inadmissible in evidence cannot be accepted.

Question no.(i) is answered in negative.

Question No.(ii):

25. On this point the argument of Sri. Hashmath Pasha was that the investigating officer requested PW5 to issue confirmation letter of date of birth of PW1 and thereafter PW5 issued Ex.P8. That means Ex.P8 was the information in writing collected by the investigating officer during investigation and therefore Ex.P8 is hit by section 162 of Cr.P.C. and thus it could not have been looked into by the trial court. In support of his argument he has placed reliance on two judgments of the Supreme Court in the cases of ***Vinod Chaturvedi and Others Vs. State of Madhya Pradesh[10] -*** and ***Kali Ram Vs. State of Himachal Pradesh[8]***. At the outset it can be demonstrated that this argument is wholly unfounded for the following reasons:

26. Section 160 of Cr.P.C. empowers a police officer to secure the attendance before him of any person who he thinks to be acquainted with facts and circumstances of the case and such person shall appear before the police officer. Sub-section (1) of Section 161 of Cr.P.C. gives power to police officer to orally examine any person supposed to be acquainted with the facts

[8] (1973) 2 SCC 808

and circumstances of the case and sub-section (2) mandates such person to truly answer all questions put to him by the police officer, exception being such kind of statements as may expose him to criminal charge. What section 162 of Cr.P.C. prohibits is making use of statements or any part of the statement made by the person examined under section 161 of Cr.P.C. for any purpose at any enquiry or

[10] 1984 SCC (Cri.) 250

trial, however such statement may be used for contradicting such person examined as witness in the court. Now in these three sections, the expression *"acquainted with the facts and circumstances of the case"* conveys a very significant meaning that if a police officer during investigation examines a person and collects information relating to the incident of crime, it falls within the ambit of section 161 of Cr.P.C. The word "case" means the incident of crime in respect of which investigation is undertaken and any person who has information relating to crime is to be summoned by the investigating officer and interrogated. If such person's statement is recorded in writing, section 162 of Cr.P.C. comes into play to prohibit making use of the statement during trial unless the person who made the statement is contradicted with reference to his earlier statement before the police officer during investigation.

27. Here in this case PW5 just gave admission register extract containing the date of birth of the girl. He did not know anything about the incident of sexual assault on PW1. He did not provide any information in Ex.P8 as contemplated in section 161 of Cr.P.C. to say that section 162 of Cr.P.C. becomes applicable. The two decisions referred to by Sri. Hashmath Pasha do not lend support to his argument. In ***Vinod Chaturvedi***[12] a letter was addressed by the prosecution witness to the police officer corroborating oral testimony relating to the incident in question. That means the letter contained information relating to crime for which reason it was held that the letter could not have been made use of. In ***Kali Ram***[9] which has been followed in ***Vinod Chaturvedi*** the accused made a confession of committing crime and thereafter PW4 sent a letter to the Station House Officer stating about the confession thus made before him by the accused. The Hon'ble Supreme

[9] (1973) 2 SCC 808

Court noticed that the letter sent by PW4 was the statement made during investigation and therefore it was held to be inadmissible

12 1984 SCC (Cri.) 250

in view of section 162 of Cr.P.C. It becomes clear from these two decisions that the prohibition contained under section 162 of Cr.P.C. is for such kind of statements as made by the persons acquainted with crime or offence and not any statement or document unrelated with the crime. In this case Ex.P8 is just an information about date of birth. There is no information relating to crime. It is a document; just because it was collected during investigation, it cannot be said that it attracts rigour of section 162 of Cr.P.C. If the argument of Sri Hashmath Pasha is accepted, post mortem report or FSL report or any expert's opinion becomes inadmissible. This kind of interpretation cannot be given to section 162 of Cr.P.C.

Therefore question no.(ii) is answered in negative.

Question No.(iii):

28. The argument of Sri. Hashmath Pasha was that when accused was examined under section 313 Cr.P.C., he was not questioned relating to the age or date of birth of the girl and therefore his conviction is not sustainable. He argued that the date of birth of the girl ought to have been brought to his notice as it was incriminatory in nature. It was replied by Sri. Vijaykumar Majage as well as Smt. K.M.Archana that the accused was comprehensively questioned that he subjected a minor girl to sexual assault and he denied that question. Incriminating circumstance was brought to his notice and the judgment of conviction cannot be set aside for this reason alone.

29. We have read the evidence of PW1. She did not disclose her date of birth nor her age as on the date of the incident, she only stated that she celebrated her birthday on 16.06.2016. The investigating officer examined as PW11 also did not state the age of PW1 as on date of incident when he adduced evidence. The prosecution examined PW5 to prove the date of birth of the girl as 16.06.2004. What we find is lapse on the part of the public prosecutor in not eliciting the age or the date of birth of PW1 when he examined her in chief. It was the main question he ought to have put. Public Prosecutor also should have elicited the age of the girl from the investigating officer when the latter gave evidence in the court. Or the Judge

who recorded the evidence could have put a question to PW1 about her age or date of birth. The only question that we find from section 313 Cr.P.C. questionnaire is question no.34 put to PW8 – the doctor who examined PW1. The question put to him contains a reference to the age of PW1 being 14 years when he examined her. We also find many questions being framed incorrectly. Be that as it may, any lapse at section 313 Cr.P.C stage is curable by the appellate court by questioning the accused if according to the defence a question on incriminating circumstance was left out or omitted. But the actual issue here is, whether the age of the girl by itself is incriminatory or not. The answer is obviously 'no', for even if the girl had given her age, that by itself would not have inculpated the accused unless she stated about sexual assault on her by the accused. In other words what makes incriminatory is sexual assault on a minor girl below the age of 18 years and not a statement exclusively with regard to age. The questionnaire shows that the attention of the accused was brought to actual incriminatory evidence against him. For these reasons we hold that merely because a question in regard to age only was not put to the accused, by that itself it cannot be said that the trial is vitiated and judgment of conviction is bad. Therefore question no.(iii) is answered in negative.

30. What remains is to examine the findings of the Special Court. Sri. Hashmath Pasha's contention was only with regard to DNA report marked as Ex.P17. His argument was that DNA report was not proved in accordance with law, for the scientific officer who issued the report was not examined and thereby there was no proof in accordance with law. Again this argument fails; if the scientific officer had been examined, the prosecution case would have been strengthened. Section 293 of Cr.P.C. permits using of scientific expert's report as evidence in any inquiry or trial. Sub-section (2) of section
293 states that the court may summon an expert for examination only if it thinks necessary. PW11 the investigating officer through whom Ex.P17 was marked was suggested that the report was obtained to his convenience. Except this suggestion which was denied, DNA report was not otherwise controverted. Except certain inferences to be drawn in regard to her conduct which assumes importance in imposing sentence, the testimony of PW1 touching the incident is believable. PW9 is another doctor who has deposed that PW1 delivered a female baby in the General Hospital, Chickmagalur on 4.3.2017. Baby's DNA profile matched with DNA profile of the accused. In

the light of this evidence, accused was rightly convicted by the Special Court for the offences under section 6 read with section 5(j)(ii)(l) of POCSO Act. In view of a clear case being made out for conviction under section 6 of the POCSO Act, it is not necessary to record conviction under section 376(2)(i) and (n) of IPC. Therefore we do not find good ground to interfere with findings of the Special Court to convict the accused.

31. However, we find that the sentence imposed is disproportionate in as much the Special Court has failed to assign reasons for imposing maximum sentence of life imprisonment. Accused has to be sentenced in accordance with law as it stood on the date of crime i.e., before amendment was given into effect from 16.08.2019. Section 6 of POCSO Act as it stood then permitted imposition of minimum sentence of 10 years rigorous imprisonment to maximum of life imprisonment. To subject an accused to maximum sentence requires assignment of valid reasons which are not forthcoming in the impugned judgment. PW1 is a child, strict scrutiny of her oral testimony discloses a shadow of consent on her part; but her consent is immaterial. Moreover her actual age, going by Ex.P8, as on 16.06.2016 was 12 years, but traces of consent militates against imposition of maximum sentence under section 6 of the POCSO Act. For the same reason it is difficult to uphold conviction for the offence under section 506 of IPC. It is here limited interference with impugned judgment is warranted. Now the following:

ORDER

Appeal is partly allowed. Judgment of the trial court convicting the accused for the offence under section 6 read with section 5 (j)(ii)(l) of POCSO Act is confirmed. Accused is acquitted of offence under section 506 of IPC.

Sentence imposed by the trial court for the offence under section 6 of the POCSO Act is modified, he is sentenced to rigorous imprisonment for 10 years and fine of Rs.25,000/- and in default to pay fine he shall undergo simple imprisonment for one year.

Entire fine amount of Rs.25,000/- shall be paid to PW1 towards compensation under section 357 Cr.P.C.

Accused is entitled to set off for the period he has already spent in jail.

High Court Legal Services Comittee shall pay Rs.10,000/- to Smt. K.M.Archana, advocate, who was appointed as amicus curiae by this court.