



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 25.04.2024
Judgment delivered on: 02.07.2024

+ CRL.REF. 2/2024

COURT ON ITS OWN MOTIONPetitioner

versus

STATE OF NCT OF DELHIRespondent

Advocates who appeared in this case:

For the Respondent State: Mr. Tarang Srivastava, learned APP for
State with SI Anju

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. A Reference under Section 395(2) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') has been received from the court of learned Additional Sessions Judge (SC-POCSO), South District, Saket Courts, New Delhi seeking decision on the following questions of law:-

“(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?”



(ii) Whether the principle of ‘margin of error’ is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.”.

2. Before venturing to answer the Reference, it would be useful to, briefly, refer to comprehend the factual matrix of the case¹ pending before the said referral court. It was only while dealing with the above case that the learned ASJ was, apparently, caught in a dilemma, compelling him to send the Reference in question.

3. In said case, the accused is facing trial for commission of offences under Section 376/506 IPC and for offence under Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”).

4. Since there was no school record or birth certificate indicating the date of birth of the “victim”, bone age ossification test was got conducted. As per such report (Ex.PW8/B), the age of the victim has been opined to be between ‘16 to 18 years’, noticing the general, physical, dental and radiological characteristics.

5. An argument was raised before the learned Trial Court that the age of the victim should be construed as 20 years on the premise that further margin of error of two years has to be given. In alternate, it was contended by the defence that even if benefit of such margin was not to be given, since the age of the victim, as per the ossification test, was estimated as falling between 16 to 18 years, the upper age, i.e., age of 18

¹ SC No.147/2018 titled ‘State vs. Bunty Singh’ in FIR No.463/2017, PS Hauz Khas.



years should be reckoned and, therefore, POCSO Act should be held as 'not applicable'. Defence relied upon *Shweta Gulati & Anr. vs. The State Govt. of NCT of Delhi*² whereas the prosecution relied upon *Raju Yadav vs. State of NCT of Delhi*³. Noticing the conflicting opinions in the aforesaid two cases, i.e., *Shweta Gulati* (supra) and *Raju Yadav* (supra), the aforesaid questions have been posed to us.

6. Thus, the present reference stems from the two divergent judicial opinions of this Court and we have to answer about the manner of calculation of age while considering 'bone age ossification report' of any child-victim of sexual assault.

7. We have carefully gone through the provisions of POCSO Act as well as Juvenile Justice (Care and Protection of Children) Act, 2015 (in short "JJ Act").

8. POCSO Act came into force on 14.11.2012. Undoubtedly, POCSO Act seems to be a complete code in itself which deals with the sexual offences targeted against children. The necessity of bringing POCSO Act was felt because the existing laws were not adequately addressing sexual offences against the children and, therefore, it was proposed to enact a self-contained comprehensive legislation, *inter alia*, to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process,

² 2018 SCC OnLine Del 10448

³ 2023 SCC OnLine Del 2782



incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provisions for establishment of ‘Special Courts’ for speedy trial of such offences.

9. As per Section 2(d), a child means any person below the age of 18 years. Thus, if at the relevant time, i.e., at the time of the commission of the offence, the victim is found to be a person below the age of 18 years, such victim would be considered ‘child’ in context of POCSO Act.

10. However, in the entire POCSO Act, there is no provision laying down procedure for adjudicating and evaluating the age of such child. Section 34, POCSO Act merely prescribes procedure in case of ‘commission of offence by child’ and determination of age by Special Court. It reads as under: -

“Sec.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.”



11. Apparently, as per bare reading of heading of Section 34, it envisages a situation where a wrongdoer is found to be a child. Section 34(1) stipulates that where any offence under POCSO Act is committed by a child, such child shall be dealt with under the provisions of the JJ Act. Thus, in any such situation, the Special Court ceases to have any further jurisdiction and such juvenile in conflict with law is required to be dealt with as per mandate of JJ Act.

12. Though the manner and procedure for adjudicating the age of child has not been prescribed under POCSO Act, JJ Act gives us some valuable insight.

13. As per Section 94 of JJ Act, whenever any person is brought before the Child Welfare Committee or Juvenile Justice Board and there are reasonable grounds for doubt regarding the age of such person, the Committee or the Board shall undertake the process of age determination, by seeking evidence. As per above Section, the first preference has to be given to a date of birth certificate from the school and in absence thereof, a birth certificate given by the concerned Municipal Authority and it is only in the absence of the aforesaid two documents that the age would be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

14. For the sake of convenience, we extract Section 94 of JJ Act which reads as under: -



“Sec.94 (Presumption and determination of age)-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

(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:

Provided 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.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

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15. It is, however, no longer *res integra* that the procedure prescribed under JJ Act shall not only apply to a juvenile wrongdoer but also to a victim of the crime.

16. In this regard, we may usefully refer to *Jarnail Singh vs. State of Haryana*⁴. When the aforesaid matter was considered by the Hon'ble Supreme Court, the prevalent Act was Juvenile Justice (Care and Protection of Children) Act, 2000, which prescribed the procedure for determination of age and the relevant Rules were, Juvenile Justice (Care and Protection of Children) Rules, 2007. Rule 12 of such Rules of 2007, though, meant for determining the age of a child in conflict with law, it was observed by Supreme Court that such statutory provision should also be the basis for determining age, even of a child, who was victim of crime.

17. Para 22 and 23 of *Jarnail Singh* (supra) read as under: -

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove 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

⁴ 2013 SCC OnLine SC 507



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.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(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. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be



available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, 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, in our considered opinion, it



would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis 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 clause, it has overriding effect over an option expressed in a subsequent 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 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 opinion.”

(emphasis supplied)

18. Thus, the Hon'ble Supreme Court, in no uncertain terms, came to the conclusion that the procedure prescribed for determining the age of a child in conflict with law, was also equally applicable for determining the age of a victim of a crime. Though the aforesaid Act of 2000 has now been replaced by the JJ Act, 2015, fact remains that in view of the above



said specific observation, the procedure for determination of age for a child-victim would still remain the same.

19. If one has a school certificate or birth certificate, then obviously there would not be any difficulty, provided these documents are duly proved before the Court in accordance with law and are admitted in evidence.

20. The age given in any such birth certificate or school record would be a specific and fixed one, being based on date of birth.

21. In absence of said documents, when the Court orders for ossification test, such test though gives us the estimation of age but it does not provide us with precise and definite age. It rather gives us a reference range, which, generally, is found to be of two years.

22. In the case in hand also, such estimation age is given as 16-18 years by the concerned Medical Board. The issue is whether age of the victim should be taken on the lower side or on the upper side of such range. What ought to be the approach of the Court – whether to consider the age of the child victim as 16 years or as 18 years? And secondly and more importantly, whether any further “margin of error” is also to be applied on either side, thereby making the age range, in context of present situation, from ‘16 to 18 years’ to ‘14 to 20 years.’

23. We cannot be oblivious of the fact that we are following adversarial system of law where the presumption of innocence is indispensable philosophy. Though in any criminal trial, the endeavour is



to reach the truth, in adversarial system, the judge generally acts like an umpire who watches whether the prosecution has been able to prove the case beyond reasonable doubt or not. Since the adversarial system in India is based on the ‘innocence of the accused’, the burden of proof, generally, falls on prosecution. Our criminal system prescribes that a case against any accused has to be proved beyond doubt. Meaning thereby, if there is an element of doubt, such benefit has to go to the accused.

24. Admittedly, in context of any juvenile wrongdoer, the endeavour of the defence would always be to seek margin of error on the ‘lower side’ as the same would prove to be beneficial for such wrongdoer who would be in a better position for being treated as juvenile in conflict with law, thereby becoming entitled to get due protection in many ways, including sentencing aspect. Thus, though the courts are zealous to see that a juvenile gets benefit of the provisions of JJ Act but at the same time it is also imperative for the courts to ensure that such protection and privileges are not misused by unscrupulous persons to escape punishments for having committed serious offences⁵.

25. Be that as it may, the margin of error is, generally, applied on the lower side while considering the age of any such juvenile in conflict with law.

26. Interestingly, as per the earlier Rules, i.e., the Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 itself provided that whenever a medical opinion was to be sought from a duly constituted

⁵ *Mukarrab and others v. State of Uttar Pradesh 2016 SCC OnLine SC 1413*



Medical Board and in case the exact assessment of age could not be done, the Court or the Board or the Committee, for the reasons to be recorded, may, if considered necessary, give benefit to the child or juvenile by *considering his/her age on lower side within the margin of one year* .

27. Obviously, the margin of one year on the lower side was given in order to achieve the underlying objective of JJ Act. Qua the border-line cases, where the concerned competent authority or the Court was not fully certain and sure whether the person was actually a child in conflict with law or not, it was considered necessary that in case there being any doubt of any kind whatsoever, the benefit of one year on the lower side be given so that such person is considered a juvenile and is duly taken care of in accordance with JJ Act and the Rules made thereunder.

28. We note that in JJ Act, 2015, such provision regarding ‘benefit of margin of one year on the lower side’ has been dispensed with as there is no such stipulation in Section 94 of JJ Act, 2015. However, the judicial precedents still carry full weight, which we shall discuss little later.

29. Let us now take note of the conflicting judgments, as noted by the learned Trial Court in its order dated 06.02.2024.

30. In *Shweta Gulati* (supra), though the question was with respect to the payment of wages to a minor victim who had been sexually assaulted, there was no document ascertaining her age and, therefore, the bone age ossification test of victim was got conducted and as per such report, the age of the victim was determined to be in range of 17 to 19 years. The



concerned *Child Welfare Committee* determined the age of the victim as 17 years, which order was upheld in appeal by the Court of learned ASJ. When the revision petition was filed before this Court, this Court made reference to *Jarnail Singh* (supra) and held that benefit of doubt, at all stages, was to go to the accused.

31. Para 13 to 19 of said judgment reads as under: -

“13. The question that arises for consideration is as to whether, while determining the age of the victim, the benefit of doubt in age estimated by the bone ossification test is to go to the accused or the victim.

14. The settled principle is that the ossification test is not conclusive of age determination. It is settled that it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. The Supreme Court, in several decisions, has taken judicial notice of the fact that the margin of error in age ascertained by radiological examination is two years on either side.

15. Now the question that arises for consideration is as to whether the lower of the age or the higher of the age is to be taken. If benefit of doubt has to go to the accused then one would have to take the higher limit and if benefit of doubt has to go in favour of the prosecutrix then the lower of the two limits would have to be taken.

16. It is also settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused.

17. In the present case as no document of age was available, the age has been determined by the Child Welfare Committee as 17 years based on the ossification report. The bone ossification test report has estimated the age as 17 to 19 years. So applying the margin of error principle, of two years on either side, the age could be between 15 to 21 years. In the present case even if the margin of error is not taken on the higher side, the upper limit of the age estimated by the ossification test is 19 years.



18. Giving the benefit of doubt to the accused, the age of the victim has to be taken as 19 years of age. Accordingly, the order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 is not sustainable.

19. In view of the above, the impugned order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 is set aside to the limited extent that it determines the age of the victim as 17 years.”

32. Thus, as per the aforesaid judgment delivered on 08.08.2018, the upper age was considered in order to ensure that the accused was not prejudiced in any manner. It was with the apparent objective that if there was any uncertainty, the benefit of doubt should go to accused and accused only.

33. Same issue again cropped up before this Court in *Raju Yadav* (supra). In that case, the accused had been held guilty for committing various offences including sexual assault and he filed appeal challenging his such conviction and order on sentence. Appellant took the plea that the victim was minor. In said case, there was no birth certificate or school record and bone age ossification test was got conducted, which opined her age between 15-17 years. The contention of the accused was that after taking into consideration the margin of error of 2 years, the age of the prosecutrix should be considered as 19 years on the date of offence and, therefore, the accused could not have been convicted under POCSO Act. This Court took note of the objective of POCSO Act and held that for determining the age of a child victim under POCSO Act, *the inclination of the Court should be towards considering the lower side on*



the margin of error as that would be in consonance with the objective of POCSO Act. It was observed that it could not be the intention of POCSO Act to treat a victim, a border-line minor, as a major in case the victim did not have a birth certificate/school certificate and has undergone a bone age ossification test. The appeal was dismissed holding that such an interpretation would not be in furtherance of POCSO Act but rather in contradiction and derogation to the objective and purpose of POCSO Act. Said judgment is dated 16.05.2023 and it looks that the parties did not bring to the knowledge of the Court, the ratio given in *Shweta Gulati* (supra).

34. Obviously, there is a conflict between the aforesaid two judgments of *Shweta Gulati* (supra) and *Raju Yadav* (supra).

35. However, there is one important aspect which cannot be lost sight of.

36. These two judgments are rendered by Single Bench of this Court.

37. There is a judgment of Division Bench of this Court as well as one judgment of the Supreme Court which answer the given Reference to a very large extent.

38. In the case of *State v. Basir Ahmad*⁶, a Coordinate Bench of this Court presided over by one of us, (Suresh Kumar Kait, J.) was faced with the similar issue. The accused, who was facing trial for committing sexual assault, was acquitted by learned Trial Court observing that the

⁶ 2023 SCC OnLine Del 5852



age of the prosecutrix was shown to be between 17 to 19 years and, therefore, there was no conclusive evidence of her being a minor at the time of alleged offence. Consequently, the benefit was extended to the accused who was acquitted. Such order was assailed before this Court and the appeal was dismissed. This Court not only upheld the factum of consideration of the age on the upper side of ossification report while assessing the age of the prosecutrix but also approved the principle of giving further margin of two years to such upper estimated age. The pertinent excerpt from the aforementioned judgement is as under:

*“12. The question which thus arises is whether the lower or the upper age recommended in the ossification test should be adopted to be the age of the prosecutrix. If benefit of doubt has to be given to the accused under all circumstances, then, it is the higher limit which has to be taken and benefit extended as has been held in the cases of **Triveniben Vs. State of Gujarat (1989) 1 SCC 678 and Maru Ram Vs. Union of India (1981) 1 SCC 107**. So being the case, we may consider the range of age of the prosecutrix as given in the ossification test to be 17 to 19 years. Applying the margin of error principle of two years on either side, the age of the prosecutrix could be anything between 15 to 21 years. Even if the margin of error is not on the higher side, the upper limit of the age has been estimated by the ossification test as 19 years. Giving the benefit, the age of the prosecutrix has to be held as 19 years. Similar conclusion was taken by the Court in the case of **Shweta Gulati vs. State of NCT of Delhi 2018 SCC OnLine Del 10448**. We thus find that learned ASJ has rightly held the prosecutrix to be major at the time of incident. We find no infirmity in the findings in respect of the age of the prosecutrix.”*

39. In context of said all important aspect of ‘granting of benefit of doubt to accused at every stage’, we may also refer to *Rajak Mohammad*



v. *State of Himachal Pradesh*⁷ whereby the Hon'ble Supreme Court allowed the appeal of the convict who was facing charges of kidnapping and sexual assault and acquitted him while observing as under:-

“4. In view of the above, the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent.

5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the school admission form (Ext. PW 5/A) and the certificate (Ext. PW 5/B) issued by one Jasdeep Kaur (PW 5), JBT Teacher of Government School Dungi Plate. PW 5 in her deposition has stated that the writings in the school admission form (Ext. PW 5/A) are in her handwriting and the signature affixed is that of the mother of the prosecutrix.

6. In cross-examination, PW 5 had stated that the details mentioned in Ext. PW 5/A have been obtained from the school leaving certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the admission form (Ext. PW 5/A) was filled up by PW 5 has not been exhibited by the prosecution.

7. Nothing hinges on the document exhibited by the prosecution as Ext. PW 5/B as that is the consequential certificate issued on the basis of the entries in Ext. PW 5/A. The mother of the prosecutrix who had allegedly signed Ext. PW 5/A has not been examined by the prosecution.

8. On the other hand, we have on record the evidence of Dr Neelam Gupta (PW 8), a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

⁷ 2018 SCC OnLine SC 1222



9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.

11. We will, therefore, have to conclude that the appellant-accused deserves to be acquitted on the benefit of doubt. We, consequently, set aside the order of the High Court and the conviction recorded as well as the sentence imposed and acquit the appellant-accused of the offences alleged. We further direct that the appellant-accused be released from custody forthwith unless his custody is required in connection with any other case.”

(emphasis supplied)”

40. Thus, the Hon’ble Supreme Court in *Rajak Mohammad* (supra), held that the age established by a radiological examination might not be precise and, therefore, sufficient margin of error must be allowed. It also considered the upper estimated age observing that the accused must get the benefit of doubt.

41. Respondent/State has also assisted this Court by Mr. Tarang Srivastava, learned APP who, in all fairness, admits the above situation and states that keeping in mind the fact that benefit of doubt must go to accused at all the stages, the upper age needs to be taken, while also



giving further requisite margin of two years. Learned APP has also placed his reliance on a Division Bench judgement of this Court *State v. Mohd. Shakir*⁸, wherein as per the ossification report the age of the victim had been assessed between 16-18 years. This Court held that *it is a settled principle of law that the benefit of doubt at all stages, other things being equal, goes in favour of the accused. It is also an established principle of law that if in a case the benefit of doubt has to go to the accused then the upper limit of the age bracket is assumed as held by the Apex Court in Ram Suresh Singh v. Prabhat Singh reported in (2009) 6 SCC 681 and Jyoti Prakash Rai v. State of Bihar reported in (2008) 15 SCC 223.*

42. In *Ram Suresh Singh v. Prabhat Singh*⁹, *Jyoti Prakash Rai v. State of Bihar*¹⁰, it has been observed by Hon'ble Supreme Court that the age determined by ossification test is not a precise one and, therefore, two-year margin of error/ flexibility needs to be applied on either side. Of course, these judgments were in context of juvenile in conflict with law but the principle of applying 'margin of error' shall be no different while considering a case of child-victim.

43. In *Karan v. State of Madhya Pradesh*¹¹, it has been observed by Full Bench of Supreme Court that ossification test gives only a broad assessment of the age and it cannot give an exact age. It also observed

⁸ 2019 SCC OnLine Del 7262

⁹ (2009) 6 SCC 681

¹⁰ (2008) 15 SCC 223

¹¹ 2023 SCC OnLine SC 217



that there is also an element of margin of plus or minus one to two years.

44. The ossification test determines age based on the “degree of fusion of bone” by taking the x-ray of a few bones. It evaluates the process of the bone formation based on fusion of joints between birth and generally upto the age of 25-30 years. Bone age is an indicator of the skeletal and biological maturity of an individual which assists in the determination of age. The most common method used for calculation of the bone age is radiography of the hand and wrist until the age of 18 years as the elongation of the bone is complete after adolescence. Beyond that, the medial age of clavicle is used for bone age calculation till the age of 22 years. Of course, age determination using ossification test does not yield accurate and precise conclusions, particularly after the examinee crosses the age of 30 years. In *Mukarrab*(supra), Hon’ble Supreme Court has observed as under:-

“26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At p. 31 of Modi’s Textbook of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

“In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following Table, but it must be remembered that too much reliance should not be placed on this Table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development.”

Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for



determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.”

45. Thus, the legal position seems fairly settled and quite apparently, the attention of the learned Trial Court was not drawn to Division Bench judgment of this Court as given in *State v. Basir Ahmad (supra)*. We have no reason to come to any different opinion. Moreover, we have already taken note of the judgment given by Hon'ble Supreme Court in *Rajak Mohammad (supra)* which leaves no uncertainty in our minds in answering the Reference in question.

46. As an upshot of our foregoing discussion, the Reference is answered as under: -

(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?

Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.

(ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.

Ans: Yes. The margin of error of two years is further required to be applied.



47. In view of above, learned Additional Sessions Judge shall decide the case in accordance with the observations made herein above and in terms of answers to the Reference.

48. Reference stands answered and the present matter stands disposed of.

49. The Registry of this Court is directed to transmit copy of this order to the concerned Court and to all the learned Principal District & Sessions Judges for information and compliance, who shall also bring the same to the notice of the concerned Courts.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

JULY 02, 2024
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