CUSTODY OF MINORS IN CRIMINAL MATTERS

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1. **"Age of majority"--- what is?**--- Section 3 of the Indian Majority Act, 1875 reads thus :"Age of majority of persons domiciled in India (as amended w.e.f. 16.12.1999) : **(1)** Every person domiciled in India shall attain the age of majority on his completing the age of **eighteen years** and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

2.01. **Custody of minor children a sensitive issue**--- Custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. See--- **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**

2.02. **Welfare of minor to be paramount consideration for deciding minor's custody**--- In the matter of dispute of custody of a 1½ year old child in between the husband and wife, explaining Sec. 17 of the Guardians And Wards Act, 1890, it has been held by the Supreme Court that in deciding the custody of minor children, main consideration of the court must be welfare of the minor and not the legal rights of a particular party. See---

1. **ABC Vs. State (NCT) of Delhi, (2015) 10 SCC 1**
2. **Dr. V. Ravichandran vs. Union of India, 2009 Supreme 362 (Three-Judge Bench)**
3. **Lekha vs. P. Anil Kumar, 2007 (66) ALR 150 (SC)**
4. **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**
5. **Dr. (Mrs.) Veena Kapoor vs. Shri Varinder Kumar Kapoor, (1981) 3 SCC 92 (Three-Judge Bench)**

2.03. **Legal right of party not relevant for deciding minor's custody**--- In deciding matters concerning custody of minor children, the main consideration of the court u/s. 17 of the Guardians And Wards Act, 1890, must be welfare of the minor and not the legal right of a particular party. See--- **Dr. (Mrs.) Veena Kapoor vs. Shri Varinder Kumar Kapoor, (1981) 3 SCC 92 (Three-Judge Bench)**

2.04. **Balance to be struck between the attachment & sentiments of the parties and welfare of the minor**--- A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance. See--- **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**

2.05. **Affluence & capacity of party to provide comfortable living not always relevant consideration for deciding custody of minor**--- In a sensitive matter like the custody of minor child, no single factor can be taken to be decisive. Neither affluence nor capacity to provide comfortable living should cloud the consideration by the court. See--- **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**

2.06. **Transfer of custody of children from father to mother**--- Where there was matrimonial dispute pending in between the spouses and question of transfer of custody of children from father to mother was raised, it has been held that the paramount consideration in such matters should be the welfare of the children. See--- **Syed Saleemuddin vs. Dr. Rukhsana, (2001) 5 SCC 247**

2.07. **Interim custody of minor not to be hastily & ordinarily disturbed**--- Custody orders by their nature can never be final. However, before a change is made, it must be proved to be in the paramount interest of the children. In a sensitive matter like this, no single factor can be taken to be decisive. Neither affluence nor capacity to provide comfortable living

should cloud the consideration by the court. See--- **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**

2.08. **Custody or guardianship order is never final and can be changed any time** : Guardianship or custody orders never attain permanence or finality and can be questioned at any time by any person genuinely concerned for the minor child if the child's welfare is in peril. The uninvolved parent is, therefore, not precluded from approaching the Guardian Code to quash, vary or modify its order if the best interests of the child so indicate. See : **ABC Vs. State (NCT) of Delhi, (2015) 10 SCC 1** *(paras 24 & 25).*

2.09. **Custody of child borne in foreign country :** In the case noted below, the child was borne to the parents in America and its custody was granted to mother by the court in America in divorce proceedings with visitation rights to the husband. The wife in defiance of the court's order brought the child to India. The Supreme Court of India held that the wife cannot gain advantage of her own wrong. The order passed by the High Court in a Writ Petition filed under Article 226 of the Constitution by the father as habeas corpus Writ Petition to return the child to America was held justified. The husband was directed to arrange for stay of wife and the child in USA, get warrants issued against the wife cancelled and personally escort the wife and the child from India to USA. It has also been held by the Supreme Court of India that the courts in other countries should ensure that wrong doer does not gain advantage of his wrong doing. Allowing court in other country to assume jurisdiction would encourage forum shopping. See : **Arathi Bandi Vs. Bandi Jagadrakshak Rao & Others, AIR 2014 SC 918.**

3.01. **Major girl is free to stay in any place even against the wishes of her parents or husband**--- Interpreting Article 21 of the Constitution, it has been held by the Supreme Court that a woman who has attained majority

is free to stay in any place she likes without constraint by her parents or alleged husband. See--- **Gian Devi vs. Superintendent, Nari Niketan, Delhi, (1976) 3 SCC 234 (Three-Judge Bench)**

3.02. **Major girl's custody to father held proper in the event of offences u/s. 363, 366 IPC**--- Where the girl was recovered from clutches of person accused of offences u/s. 363, 366 IPC, giving of custody u/s. 98 CrPC to her father has been held not to be against her welfare as her custody with her father would provide her a healthy, fair and moral atmosphere to live in whereas such atmosphere cannot be expected if she is kept in Nari Niketan or where she is left free to go to any place of her choice. See--- **Niki Gupta vs. State of U.P., 2008 CrLJ (NOC) 1045 (All).**

3.03. **Major girl willing to live with her husband to be released from Nari Niketan**--- Where an FIR against the accused to whom a major girl had married, was lodged for offences u/s. 363, 366, 452, 504, 506 IPC and u/s. 7 Criminal Law Amendment Act and the girl was lodged in Nari Niketan under order of ACJM, Lakhimpur Kheri and meanwhile the accused/husband was released from jail and girl aged 20 years was willing to live with her husband/accused, her detention at Nari Niketan was declared illegal and she was set free to go with her husband/accused. See--- **Smt. Suneeta vs. State of U.P., 2003 (47) ACC 1046 (All—D.B.)**

3.04. **Major girl has right to go with her husband/accused of offences u/s. 363, 366 IPC**--- Where an FIR for offences u/s. 363, 366 IPC was lodged against the accused/husband to whom a major girl had married, explaining Sec. 98 CrPC, it has been held that once the girl becomes major she has her own right to stay as per her will and as the girl wanted to go with her husband, the investigating officer was directed not to arrest the husband/accused till the submission of charge sheet or final report. See---

1. **Sayed Sadab Hasan vs. State of U.P., 2006 (55) ACC 424 (All—D.B.)**

2. **Nitin Agnihotri vs. State of U.P., 2006 (54) ACC 235 (All—D.B.)**

3.05. **Major girl and boy willing to marry each other ordered to be accommodated in hostel till solemnization of their marriage in accordance with Islamic rites:-** Where an unmarried girl of 18 years of age was kidnapped and detained illegally against her wishes and she was not willing to stay with her brother and the accused and the girl were willing to marry each other, the High Court ordered the girl to be accommodated in hostel till solemnization of their marriage in accordance with Islamic rites. See: **Mohammad Jabir Vs Shijas, 2013 CrLJ (NOC) 64(Kerala)(DB).**

3.06. **Major girl not to be detained in Nari Niketan**--- Where a major Muslim girl who had done M.A. and had married a major Hindu boy and was detained in Nari NIketan at Kanpur Nagar under orders of SDM and she had stated about illtreatment by her mother and brother and was not willing to go with them to her house and preferred to go with her husband, it has been held that the major girl should be allowed to go where she pleases instead of her confinement at Nari Niketan. In such matters Sec. 97 or Sec. 171 CrPC cannot be pressed into service for detaining the major girl in Nari Niketan. When a person had crossed the age of majority i.e. 18 years, no fetters can be placed upon her choice of the person with whom she wants to stay and that the court or the relations of such person cannot substitute their own opinion or preference for that of her in such a matter. The fact that such female person has been cited as witness in a case is no valid ground for her detention in Nari Niketan against her wishes. When she has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be held to be in accordance with law. See---

1. **Km. Ajra Khan vs. State of U.P., 2009 (66) ACC 802 (All—D.B.)**
2. **Idrish Mohd. vs. Memam, (2000) 10 SCC 333**

3. **Smt. Shakeela Begum vs. SSP, Moradabad, 1999(39) ACC 422 (All—D.B.)**
4. **Smt. Parvati Devi vs. State of U.P., 1982 (19) ACC 32 (All—D.B.)**
5. **Gian Devi vs. Superintendent, Nari Niketan, Delhi, (1976) 3 SCC 234 (Three-Judge Bench)**

3.07. <u>Major girl aged about 18 or above 18 years not to be detained in Nari Niketan :</u> In the case of Smt. Kavita Vs. State of UP & Others, 2012 (79) ACC 602 (Allahabad…D.B.) a Division Bench of the Hon'ble Allahabad High Court has held thus : "However, we are conscious of the fact that there might be some dispute regarding the petitioner being aged below 18 years or more than that age, on the date of occurrence, but we have considered the age recorded in her school records which was 15.04.1994. We do not have any hesitation in recording that the lady, Smt. Kavita, is aged about 18 years of age. The medical assessment of age may also not be conclusive. The determination of age is always in the realm of being the estimated age on account of scientific exercise. This is the reason that the Supreme Court in the case of Jaya Mala V. Home Secretary, Government of Jammu and Kashmir, had observed that if the age has been determined by the doctor medically then three years have to be added to such assessed age. That judgment has consistently been followed in the cases of the present nature to give weightage to assess the age of the victim so as to appreciating the evidence of minority/majority of the victim in favour of the accused. In addition to that, it is trite that if the girl who is at the verge of majority, walks out of her parent's house to go with any man, then it could not be a case of kidnapping as the same could not be said to be an act of taking away or enticing away a woman below 18 years of age. It could be a mere case of elopement. This proposition was laid dow by the Supreme Court in the case of S. Varadarajan Vs. State of Madras. We are not concerned with that aspect of the matter. We are mainly concerned as to whether a lady who is 18 or more years of age, could be directed to be confined. **Even**

assuming that the lady was below 18 years of age, we have to keep in our mind that Smt. Kavita was not an accused, she has not committed any offence. Legally, her custody could not be authorized by any Court in connection with any offence which is alleged having been committed on account of taking or enticing her away from her lawful guardianship. It would have been in the fitness of thins that the learned Chief Judicial Magistrate should have appreciated that position of law and should not have directed the confinement of the lady in Nari Niketan, as he did. He could have directed her to be set at liberty at any rate. We have just recorded that the lady is aged 18 years or more than that and is thus, major and her liberty could never be confined by an order which might be having the tinge of judicial sanctity. Usually judicial sanctity is attached to resisting such order so as to resisting the release of such confined persons. But the balance of reasonableness, which is the hallmark of judging such orders, convince us that any judicial order, which failed the scrutiny on reasonableness could not be upheld. The lady, Smt. Kavita, was more than 18 years of age and as such, the order of the Chief Judicial Magistrate and that passed by the learned Sessions Judge in the form of Annexures 5 and 6 respectively, could not be upheld. **We are clearly of the view that the lady was wrongfully confined in exercise of an illegal judicial jurisdiction. We, as such, direct that the lady, Smt. Kavita, be set at liberty immediately so that she could go to the place or to a person, she likes or chooses to.** With the above directions, we dispose of the present petition. **Smt. Kavita Vs. State of Uttar Pradesh & Others, 2012 (79) ACC 602** *(paras 4, 5 & 6).*

3.08. **<u>Major girl and boy undergoing inter-caste or inter-religious marriage entitled to police protection</u>**--- Explaining the concept of right to life and personal liberty guaranteed by Article 21 of the Constitution,

the Supreme Court has directed the police and administration to protect from harassment, threats or act of violence such major boys or girls who have undergone inter-caste or inter-religious marriages. It has further been directed that stern action should be taken against persons who give threats or harass or commit violence against major boys or girls undergoing inter-caste or inter-religious marriages. See--- **Lata Singh vs. State of U.P., 2006 ALJ 357 (SC).**

3.09.01.<u>A major girl not to be detained in Nari Niketan against her wishes</u> : Where in the FIR registered u/s 363, 366 of the IPC, a girl aged about 18 years was alleged to have been kidnapped and in her statement u/s 164 CrPC, she had expressed her willingness to remain with Manish, her husband/ accused, and was not willing to go to Nari niketan but was still sent by the CJM, Gorakhpur to Nari Niketan, the Hon'ble Allahabad High Court, directing her immediate release from the Nari Niketan the same very day by the end of next hour, had observed that the CJM was simply ignorant of the constitutional provisions of procedure being reasonable and liberty being the most fundamental right of a person. It was further observed by the Hon'ble High Court that the confinement of the lady in Nari Niketan, which could never be proper place for custody of young lady, was not only illegal but wrongful confinement also. The Hon'ble Court further directed the State of UP to pay compensation of Rs. 50,000/- to her for her wrongful confinement. See….**Smt. Saroj Vs. State of UP & Others, 2012 (77) ACC 882 (All…DB).**

3.09.02.<u>A male child cannot be kept in Nari Niketan beyond age of 07 years</u> : A male child cannot be kept in State Women Protection Home beyond age of 07 years. See : **Sohan Lal Vs. Addl. District & Sessions Judge, Lucknow, AIR 2015 All 33.**

3.09.03.<u>Family court has jurisdiction to decide custody of minor children</u> : Family court has jurisdiction to decide custody of minor children. See **:**

Dharma Dutt Chaturvedi Vs. Principal Judge, Family Court, AIR 2015 (NOC) 322 (All).

3.10. **<u>Conflict between radiological opinion & school certificate</u> :** Age determination--Conflict between radiological opinion and school certificate--Age of girl estimated by doctor to be about 19 years while High School Certificate mentioning her birth date as 25.05.1996. Margin of flexibility or margin o error cannot be lowered any further below 18 years--Where doctor observed that girl is above 18 years of age, it obviously means that girl is not less than 18 years of age--Such an obs Juvenile Justice-- Age determination--conflict between radiological opinion and school certificate --age of girl estimated by doctor to be about 19 years while High School certificate mentioning her birth date as 25.05.1996--Margin of flexibility or margin of error cannot be lowered any further below 18 years--Where doctor observed that girl is above 18 years of age, it obviously means that girl is not less than 18 years of age--Such an observation indicates lower most outer limit of flexibility bracket--Such kind of observation is made by doctors on basis of fusion of certain bones of body which cannot be completed before a person attains a particular age--Individual age variations of particular fusion are not and cannot be stretched beyond certain limits--categorical opinion of doctor regarding age of girl completely and belies contradictory age shown in High School certificate--In view of statement of girl given before J.M. refuting all allegation of coercion exercised by petitioner No. 1--Showing her complete willingness and approval to her marital status with him--Giving due weight to irreconcilable conflict of age continuation of girl's detention in Nari Niketan not justified--Court directed to set at liberty with immediate effect--Impugned orders of lower Court quashed--Revision allowed. See : **Vivek Chandra Bhaskar Vs. State of UP, 2013 (82) ACC 707(All)**

4.01. **<u>Immoral Traffic (Prevention) Act, 1956 & detention in Nari Niketan</u>**- No person can be kept in a protective home unless she is required to be kept there either in pursuance of the Immoral Traffic (Prevention) Act, 1956 or under some other law permitting her detention in such a home. See---

1. Km. Ajra Khan vs. State of U.P., 2009 (66) ACC 802 (All—D.B.)

2. Smt. Kalyani Chowdhary vs. State of U.P., 1978 CrLJ 1003 (All—D.B.)

4.02. **<u>No detention in Nari Niketan even under ITPA, 1956 without permission of court</u>**--- In the matter of detention of women and girls in the Nari Niketan without prior permission of the court under Suppression of Immoral Traffic in Women and Girls Act, 1956 & U.P. Suppression of Immoral Traffic in Women and Girls Rules, 1961, it has been held that even under the abovenoted Act the women and girls cannot be detained in Nari Niketan without the permission of the court. The Supreme Court directed the State Government for constituting Board of Visitors, improving living conditions of the inmates of such protective homes and for formulating programmes of rehabilitation of the inmates. See--- **Dr. Upendra Baxi vs. State of U.P., AIR 1987 SC 191 (Three-Judge Bench)**

<u>Note:</u> The Hon'ble Allahabad High Court, vide CL No. 5777 dated 15.5.1993 has directed the Judicial Officers of the State of U.P. to implement the directions issued by Hon'ble Supreme Court in the case of Dr. Upendra Baxi vs. State of U.P., AIR 1987 SC 191 (Three-Judge Bench).

5.01 **<u>Minor girl's detention in Nari Niketan held valid</u> :** In the case noted below, an FIR for kidnapping of a minor girl was lodged for offences u/s 363 & 366 IPC. The girl was recovered by the IO and her statement was recorded by the Magistrate u/s 164 CrPC. The IO moved an application before the Magistrate for order for her custody. The girl born in 1994 had

passed 8th class examination but had failed in 9th class. She had performed her marriage in a temple of Nagina, Bijnaur with the accused and wanted to go with her husband/accused and did not want to live in Nari Niketan (Moradabad). She had refused to go with her father who was also present in the court and was seeking custody of the corpus but the corpus was having apprehension of danger to her life from her father. According to school certificate, the date of birth of the corpus was 10.05.1996 and she was about 16 years of age on the date of alleged incident on 20.06.2012. In medical examination report, she was found of nearly 19 years of age. The Judicial Magistrate, Najibabad, Bijnore recorded a finding that from her physical appearance she appeared to be minor and was declared minor. In such age, she was driven by a emotions and not capable to foresee the future prospects of her life. Corpus refused to go in company of her father. In such circumstances, Judicial Magistrate sent corpus to Nari Niketan. The Division Bench held that the order of the Magistrate did not suffer from any illegality or irregularity and her detention in Nari Niketan was not illegal." See : **Smt. Himani Vs. State of UP, 2013 (82) ACC 865 (All)(DB)**

5.02. **<u>A minor girl given in custody of her father & brother against her wishes</u> :** *In the present case the corpus was the victim of case crime No. 168 of 2012 under Section 363 and 366 IPC. According to the FIR she was kidnapped by Sumit, she remained in her company, she has been recovered. According to the High School mark-sheet she is minor and she has refused to go to her parents' house, she had stated that she would like to live in Nari Niketan. In such circumstance, the learned Judicial Magistrate, the Deoband has not committed any error in passing the impugned order dated 15.09.2012 by which she has been sent to nari Niketan. The present petitioner is devoid of merit, the same may be dismissed. Considering the facts, circumstances of the case, submission*

made by learned Counsel for the petitioner, learned A.G.A. and considering the statement of the corpus and her school certificate it appears that according to the High School marksheet her date of birth is 08.06.1996, she is minor, she has been allegedly kidnapped, thereafter she remained in the company of accused Sumit, she is not full major girl to take the proper decision for her future life. She herself stated in the Court that she had not performed the marriage with Sumit but she wanted to go with the accused Sumit. In such circumstances she may not be permitted to go with Sumit who is accused in case crime No. 168 of 2012 under section 363 and 366 IPC and the girl was not married with him. The corpus has stated that she was preferring to life in Nari Niketan than to life at her parents' house. This petition has been moved by her father who is natural guardian of the corpus. The corpus may not be kept in Nari Niketan for indefinite period. The corpus has not disclosed any reason for not living at her parents' house. The brother and father of the corpus are ready to take her custody. In such circumstances, we feel it proper that corpus may be released from Nari Niketan and she may be given in the custody of her father and brother. Therefore, we direct that corpus be released from Nari Niketan, Meerut forthwith in the presence of Officer Incharge of P.S. Nagal, District Shaharanpur who shall take the corpus to her parents house and she shall be given in custody of her father and brother on undertaking that she shall be properly maintained. In any manner she shall not be harassed. The officer incharge of P.S. Nagal shall ensure that the corupus be properly nourished and maintained at her parents' house and in any manner she shall not be harassed by any of the family members of her parents." **See : Km. Munni Vs. State of UP, 2013 (82) ACC 820 (All)(DB)*(paras 6 & 7)***

5.03. **<u>Even a minor female not to be detained in Government Protective Home or Nari Niketan against her wishes</u>**--- Where in a case of alleged

abduction of minor girl, search warrant u/s 97 CrPC was issued by Executive Magistrate and an FIR by the mother of the girl against her alleged husband was lodged u/s. 363, 366 IPC and on recovery of the girl, she was directed to be detained at Nari Niketan and on medical examination, **she was found to be not less than 17 years of age and she was not willing to go with her mother and rather was willing to go and live with her husband/accused, it has been held that her detention in Nari Niketan against her wishes was illegal as even a minor cannot be detained in Protective Home against her wishes. The minor girl, who was not less than 17 years old as per the medical report, was directed to be set at liberty to go with any one and any where**. See---

1. **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**
2. **Smt. Parvati Devi vs. State of U.P., 1982 (19) ACC 32 (All—D.B.)**
3. **Smt. Shahana @ Shanti vs. State of U.P., 2003 (46) ACC 600 (All—D.B.)**
4. **Tara Chand Seth vs. Supdt., District Jail, Rampur, 1983 (2) ACC 168 (All—D.B.)**
5. **Pushpa Devi @ Rajwanti Devi vs. State of U.P., 1995 (1) JIC 189**
6. **Mrs. Kalyani Chowdhary vs. State of U.P., 1997 ALJ 975 (All—D.B.)**

5.04. **Magistrate not to act as natural guardian or duly appointed guardian of minors**--- A Magistrate is not a natural guardian or duly appointed guardian of the minors unless so appointed. See--- **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**

5.05. **Executive magistrate has no jurisdiction to decide custody of kidnapped child u/s 97 CrPC:-** Where the father of a child had alleged that his minor son was kidnapped by his mother and the SDM after issuing search warrant u/s 97 CrPC recovered the boy from mother's custody and handed over his custody to his father, it has been held by the

Rajasthan High Court that the executive Magistrate had no power under Section 97 CrPC to wrest the custody of a child from its natural guardian. Section 97 CrPC is restricted in its application for issuance of direction for search of a person wrongfully confined. Admittedly when the child was in the custody of his mother, there was no reason to believe that he was under wrongful confinement and as such the issuance of search warrant was itself uncalled for. That apart, the learned Magistrate virtually acted as if he was having jurisdiction to decide the custody of a minor under the Hindu Guardianship and Wards Act by directing the custody of the child to be given to his father. **See: Jaishree Tiwari Vs State of Rajasthan, 2013 CrLJ 1610(Rajasthan)**.

5.06. **A victim of offences u/s. 363, 366, 376 IPC not being accused but only witness not to be detained in Nari Niketan**--- A victim of the offences u/s. 363, 366 IPC is not an accused but only a victim of such offences. A victim may at best be a witness and there is no law whereunder the Magistrate may direct detention of a witness in Nari Niketan simply because she does not like to go to any particular place. In such circumstances the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. See---

1. **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**
2. **Mrs. Kalyani Chowdhary vs. State of U.P., 1997 ALJ 975 (All—D.B.)**
3. **Smt. Shahana @ Shanti vs. State of U.P., 2003 (46) ACC 600 (All—D.B.)**

5.07. **A married minor girl should be sent into the guardianship of her husband and not to Nari Niketan :** Where a married minor girl was sent to Nari Niketan by the in-charge CJM, Balrampur, setting aside the order of the Magistrate, the Lucknow Bench of the Hon'ble Allahabad High Court has held that "marriage of a minor would be voidable u/s 3 & 12 of the Prohibition of Child Marriage Act, 2006 at the instance of the child spouse. As per section 6(1) of the Hindu Minority & Guardianship Act,

1956, natural guardian of a Hindu married minor girl is her husband. Under Section 21 of the Guardians and Wards Act, 1890 a minor can act as a guardian of his own wife or child. Under the Hindu Minority & Guardianship Act, 1956, clause 'C' of Section 6 in the case of a married girl, the husband would be the guardian. The marriage of the married minor girl would be voidable u/s 3/12 of the Prohibition of Child Marriage Act, 2006 only when the married minor wife files a petition for that purpose. If the married minor girl wants to live with her husband in matrimonial house, then there is no legal impediment in releasing her under guardianship of her husband who would be her natural guardian. It is not in the welfare of a female to keep her in Nari Niketan for prolonged period particularly when she wants to join the company or remain in the custody of her husband who would be the natural guardian in the context of law. See : **Sonu Paswan Vs. State of UP, 2013 (83) ACC 1 (All)(LB).**

5.08. **A minor female accused under 18 years of age to be detained in remand home or recognized social institution (Proviso to Explanation II to sub-section (2) of Section 167 CrPC :** Proviso to Explanation II to sub-section (2) of Section 167 CrPC as amended w.e.f. 31.12.2009 reads thus : "Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution."

6.01. **Scope of Sec. 97 CrPC**--- Sine qua non of Sec. 97 CrPC is that there has to be prima-facie finding that person has been in wrongful confinement and that wrongful confinement must amount to an offence. Where a nine years old child is in the custody of his father, it cannot be said that father has wrongfully confined son which would amount to offence. In such situation, issuance of search warrant u/s. 97 CrPC by Magistrate on

application made by mother is not proper. See--- **Smt. Lily Manna vs. State of W.B., 2008 CrLJ 625 (Calcutta)**

6.02. **Scope of Sec. 98 CrPC**--- Section 98 CrPC is a special procedure. It is not available for all persons. It is available only for the rescue and restoration of persons belonging to the female species. Such person must be shown to be abducted or unlawfully detained. Such detention must be proved to be for unlawful purposes. What is crucial is that, this provision is not available for all children or all persons unlawfully detained for unlawful purposes. It has unmistakably a very special purpose to serve and that is the protection of the person belonging to the female species against unlawful detention for unlawful purpose. See--- **Zeenath K.V. vs. Kadeeja, 2007 CrLJ 600 (Kerala)**

6.03. **Ascertaining age of girl before ordering custody must u/s. 98 CrPC**--- Where an allegedly kidnapped girl was ordered to be given in the custody of her mother without ascertaining her age and without giving her opportunity to speak out her mind and the version of the girl was that she was major and she had volunteered to quit her home and got married with the accused/person of her choice, it has been held that the Magistrate did not have jurisdiction to pass such custody order u/s. 98 CrPC and the Magistrate had acted in biased manner and his order for restoration of the girl to her mother's custody was set aside. See--- **N. Balaji vs. Smt. Savithiri, 2004 CrLJ 2818 (Madras)**

7. **Custody of infant in the lap of female accused----** Directions issued by the Supreme Court in writ petition (C) No. 559/1994, **R.D. Upadhyay vs. State of A.P. & others, AIR 2006 SC 1946** and circulated by Allahabad High Court amongst the Judicial Officers of the State of U.P. vide **C.L. No. 34/2006 dated 7.8.2006** mandates that female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years. In such cases the courts must issue directions to the jail

authorities for proper feeding, medication and over all well-being of the infants/children in jail. These directions from the Apex Court are aimed at protecting the valuable human rights of the infants/children who are in jails with their prisoner mothers.

8. <u>Determination of age of persons whether male or female</u> :

8.01 <u>Procedure in Rule 12 of JJ Rules, 2007 to apply both to the juvenile & to the victim of crimes</u> : Even though Rule 12 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 the 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 of 2007 JJ Rules to determine the age of the prosecutrix who is the victim of offences of kidnapping and gang rape etc i.e. offences u/s 376(2)(g), 366, 120-B of the IPC (in this case). See : **Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263.** *Para (23)*

8.02. <u>Sections & Rules providing procedure for determination of age of Juvenile</u> : The relevant provisions contained in the 2000 JJ Act and 2007 JJ Rules regarding determination of age of a juvenile are as under:

(i) Sec. 7-A, 54, 68 of JJ Act, 2000

(ii) Rules 12(3)(a) & 12(3)(b) of JJ Rules, 2007

8.03. <u>Procedure in inquiries, appeals and revision proceedings (Sec. 54)</u> :

(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the

Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

Rule 13(e)- Even in cases of inquiry pertaining to serious offences the Board shall follow the procedure of trial in summons cases.

8.04. Procedure to be followed in determination of age (Rule 12(3)(a) & (b) of the 2007 JJ Rules) : (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(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 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, 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 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 7A, section 54 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 .

8.05. **Procedure in Rule 12 and preferential order of production and consideration of evidence mandatory** : Procedure given in Rule 12 of 2007 JJ Rules and the preferential order of production and consideration of evidence given thereunder is mandatory. See : **Ashwani Kumar Saxena Vs. State of M.P., 2012 (79) ACC 748 (S.C.)**

8.06. **Physical appearance & determination of age** : Where the age of an accused recorded by the trial court on the basis of evidence produced and also on his physical appearance was set aside by the High Court in exercise of its revisional power u/s 52 of the 2000 Act r/w Sec. 49, 4 & 7-A of that Act, it has been held by the Supreme Court that the revisional court (High Court) could not have reversed the findings of the trial court in exercise of its revisional powers. See--- **Jabar Singh Vs. Dinesh, (2010) 3 SCC 757.**

8.07. **School Leaving Certificate & its evidentiary value :** Where school leaving certificate was produced but nothing was shown as to whether any register was required to be maintained under any statute, any register was maintained was also not shown, original register was not produced, none was examined to prosecute entries made in the register, school leaving certificate was not issued by a person who was in school at the time when the accused was admitted therein, then interpreting the provisions of Sec. 35, Evidence Act, the Supreme Court held that such school leaving certificate cannot be relied upon to ascertain the age of a juvenile. The age of a person requires to be determined in a manner laid

down under a statute and different standard of proof should not be adopted. See---

1. **Ravinder Singh Gorkhi vs. State of U.P., 2006 (55) ACC 814 (SC)**
2. **State of Chhattisgarh vs. Lekhram, (2006) SCC (Criminal) 66—***Regarding age of Prosecutrix.*

8.08.<u>School Leaving Certificate & its evidentiary value</u> : Where the accused had for the first time claimed to be juvenile in his confession made u/s 313 CrPc and had produced school leaving certificate without producing the primary evidence of birth certificate, it has been held that the same was not satisfactory & adequate to arouse judicial conscience regarding juvenility that too when the school leaving certificate was procured after conviction. See...**Pawan Vs. State of Uttaranchal, (2009) 15 SCC 259(Three-Judge Bench)**

8.09.<u>School Leaving Certificate & Mark sheet & DOB recorded therein</u> : Where the date of birth of the accused both in school leaving certificate and mark-sheet was recorded as 18.06.1989 and the occurrence had taken place on 04.06.2007 and relying upon those documents the JJ Board had declared the accused a juvenile on the date of the occurrence but the ASJ and the High Court had erred in reversing the decision of the JJ Board, the Supreme Court while setting aside the orders of the ASJ and the High Court has held that entry relating to the date of birth entered in the school mark-sheet is valid evidence in proof of age of an accused and so is the school leaving certificate. The order passed by the JJ Board was restored. See….**Shah Nawaj Vs. State of UP & another, 2011(74) ACC 871(SC).**

8.10.<u>School Leaving Certificate when public document u/s 74 of Evidence Act</u> ? : Where the school leaving certificate was issued by the head master of the Government primary school, it has been held that

such school leaving certificate falls within the ambit of public document defined u/s. 74 of the Evidence Act and it is admissible in evidence per se without formal proof. See---**Shyam Lal vs. Sanjeev Kumar, AIR 2009 SC 3115**

8.11. School Leaving Certificate & School Register & their Probative Value ? : A document may be admissible but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The authenticities of the entries in the official records by an official or by a person authorized in the performance of official duties would depend on whose information such entries stood recorded and what was his source of information. The entry in school register/ School leaving certificate requires to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. See.... **Madan Mohan Singh Vs. Rajnikant, AIR 2010 SC 2933**

8.12.Same standard of evaluation of entries u/s 35 Evidence Act to be applied both in civil and criminal cases : In determining the age of a person contained in school admission register, same standard u/s 35 of the Evidence Act regarding the assessment of evidence has to be applied for both in civil and criminal proceedings. See—

(i) Ram Suresh Singh vs. Prabhat Singh, AIR 2009 SC 2805

(ii). Ravinder Singh Gorkhi vs. State of U.P., (2006) 5 SCC 584

8.13.School Certificate vis-a-vis records of Municipal Corporation, Goverment Hospital & Nursing Homes etc. : For determining the age of a person, the best evidence is of his/her parents if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of

reliable persons and contemporaneous documents like the date of birth register of the municipal corporation, government hospital, nursing home etc. the entry in the school register is to be discarded. See... **Madan Mohan Singh Vs. Rajnikant, AIR 2010 SC 2933.**

8.14. **Certificates issued by the school first attended should be accepted** : In case where genuineness of the school leaving certificate has not been questioned and the law gives prime importance to the date of birth certificate issued by the school first attended, there is no question of placing reliance on the contrary certificate issued by the village Chaukidar and placing reliance on statement of the mother of the claimant to decline claim of juvenility. See : **Jodhbir Singh Vs. State of Punjab, AIR 2013 SC 1** (it was a case on Punjab JJ Rules, 2000).

8.15. **Date of birth recorded in School register or school certificate valueless unless the parents or person having special knowledge of the DOB is examined** : The DOB mentioned in a school register or a school certificate has no probative value unless either the parents are examined or the persons who have special knowledge of the DOB of the person and on whose information the entry has been made have been examined. DOB recorded in school certificate may be admissible in evidence u/s 35 of the Evidence Act, but its probative value still requires to be examined. See---

(i) Satpal Singh Vs. State of Haryana, (2010) 8 SCC 714 (*case of rape &* determination *of age of prosecutrix)*

(ii). Birad Mal Singhvi Vs. Anand Purohit, AIR 1988 SC 1796.

8.16. **When conflict in between School Certificate, parents evidence and doctor's certificate** : Where School Certificates produced by accused were found not reliable, evidence of mother of accused was found not acceptable being based on estimation but the finding by the

High Court was that the accused was below 18 years of age merely on the basis of Doctor's Certificate which did not even indicate the basis for determination of age , explaining Sec 2(k) and 68 of the JJ Act, 2000 & Rule 22(5) of the U.P. JJ Rules,2004, it has been held by the Supreme Court that the finding of the High Court was not proper. See... **Pappu v. Sonu, 2009(5) ALJ 276(SC).**

8.17.<u>Mark Sheet and DOB recorded therein</u> : In determining the age of an accused person under the JJ Act, 2000, mark sheet is one of the proof and it can be admitted as evidence. See…**Raju & another Vs. State of Haryana, 2010(70) ACC 380(SC)=(2010) 3 SCC 235**

8.18.<u>When DOB in School Mark Sheet & parents evidence contrary</u>: Where in determining the age of juvenile, Sessions Judge relied on medical opinion and disbelieved high school mark sheet on the basis of oral evidence of mother who was illiterate lady and had no orientation of time, it has been held that the statement of the mother can not be relied upon to discredit the school mark sheet. See…**Ram Sajiwan vs. state Of U.P., 2011 CrLJ 1121 (All)**

8.19.<u>School Leaving Certificate & Mark sheet & DOB recorded therein</u> : Where the date of birth of the accused both in school leaving certificate and mark-sheet was recorded as 18.06.1989 and the occurrence had taken place on 04.06.2007 and relying upon those documents the JJ Board had declared the accused a juvenile on the date of the occurrence but the ASJ and the High Court had erred in reversing the decision of the JJ Board, the Supreme Court while setting aside the orders of the ASJ and the High Court has held that entry relating to the date of birth entered in the school mark-sheet is valid evidence in proof of age of an accused and so is the school leaving certificate. The order passed by the JJ Board was

restored. See….**Shah Nawaj Vs. State of UP & another, 2011(74) ACC 871(SC).**

8.20.<u>DOB recorded in Mark-sheet not relevant</u> : In Sub-clause (i) in clause (a) of sub-rule (3) of Rule 12 of the Rules, the words used are matriculation or equivalent certificate, if available. If in an enactment, the word certificate has been used, it should be taken as such and it cannot be substituted by the word mark-sheet. Had it been the intention of the Legislature that the document, certificate and the marks-sheet are equivalent to each other for this purpose the word 'mark-sheet' would have been also included there alongwith the words matriculation certificate. A mark-sheet is basically a statement of marks obtained by the student. If in a mark-sheet, the date of birth has been mentioned, that date cannot be treated as certified. In a certificate the date of birth of the student is properly certified by the authority duly recognized by law and rules who is competent to certify the date of birth. It is not proper to deviate from the regular and ordinary meaning of the word as used by the Legislature especially when there is no scope for more than one interpretation. In Rule 12 of the JJ Rules, the word 'certificate' has been used and not 'mark-sheet'. Therefore, the word 'mark-sheet' cannot be substituted for 'certificate'. See---**Shah Nawaz Vs. State of UP, 2011(1) JIC 2 (All)**

8.21. <u>Entries of Admission Register of school not a public document</u> : Age recorded in school admission register cannot be treated as a public document and it must be proved in accordance with the law. Entry of date of birth made in School Admission Register should be considered from the perspective that often persons give false age of the child at the time of admission so that he may have an advantage later in his life. When no reliable material is produced on record to show that date

of birth was recorded in School Register on the basis of statement of any responsible person and the Admission Register and T.C. fails to satisfy the requirement of Sec. 35, Evidence Act and the same are also found "forged and fabricated", then no reliance can be placed upon such entries contained in Admission Register of the school. See----

1. **Ram Suresh Singh vs. Prabhat Singh, AIR 2009 SC 2805**
2. **Sushil Kumar vs. Rakesh Kumar, (2003) 8 SCC 673**
3. **Punit Rai vs. Dinesh Chowdhary, (2003) 8 SCC 204**
4. **Rakesh Kumar vs. State of U.P. & others, 2000 (4) AWC 2722 (Allahabad—D.B.)**

8.22. <u>DOB in School Register & Parents evidence as to age of their child</u> : For determining the age of a person, the best evidence is of his/her parents if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the municipal corporation, government hospital, nursing home etc. the entry in the school register is to be discarded. See... **Madan Mohan Singh Vs. Rajnikant, AIR 2010 SC 2933.**

8.23. <u>Entries in school records/Transfer Certificate whether public document ?</u> : Considering the provisions of Sec.35 of the Evidence Act in relation to determining the age of juvenile, it has been held by the Supreme Court that if the conditions laid down in Sec.35 are not satisfied and if the entry in the school records like Transfer Certificate, Admission Form was not made in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country, the entry would not be relevant u/s 35

of the Evidence Act for the purpose of determining the age of juvenile. See--- **Jabar Singh Vs. Dinesh, (2010) 2 SCC (Criminal) 484**

8.24. <u>Entry in TC not to be relied on unless the headmaster or person concerned is examined</u> : In the matter of determination of age of the prosecutrix in a criminal trial u/s 376 IPC, it has been held that transfer certificate duly signed by the school headmaster is admissible in evidence u/s 35 of the Evidence Act. But the certificate would be of not much evidentiary value to prove the age of girl in the absence of materials on the basis of which age was recorded and unless the person who had made the entry or who gave the date of birth is examined. If the headmaster who had made the entry is not examined, the entry in Transfer Certificate cannot be relied upon to definitely fix age of the girl. See---**Alamelu vs State, AIR 2011 SC 715**

8.25. <u>Parents evidence regarding age</u> : In the matter of conviction of an accused for offences u/s. 366, 376 IPC, the evidence of parents of the prosecutrix (their daughter) to the effect that she was below 16 years of age, it has been held by the Supreme Court that the parents of the victim of rape are most natural and reliable witnesses with regard to her age. See—**Fateh Chand vs. State of Haryana, 2009 (66) ACC 923 (SC)**

8.26. <u>Parents evidence & Ossification test report & school records</u>

: Where in a rape case the statement of parents of prosecutrix was that she was below 16 years of age and this statement of parents was corroborated by two impeachable documents viz. birth register of municipal corporation and register of hospital where the prosecutrix was borne but the date of birth recorded in school certificate showing the prosecutrix above 16 years of age is belied by evidence of parents and the said unimpeachable school documents, it was held that consent of

prosecutrix was immaterial. Medical experts opinion u/s. 45 Evidence Act based on the basis of ossification test was only of an advisory character and not binding on witness of fact i.e. parents. See---**Vishnu vs. State of Maharashtra, AIR 2006 SC 508.**

8.27. <u>Ossification test and radiological examination report & determination of age of juvenile</u> : Though doctor's examination of age is only an opinion but where such opinion is based on scientific medical tests like ossification test and radiological examination, it will be treated as strong evidence having corroborative value while determining age of alleged juvenile accused. See…. **Om Prakash Vs. State of Rajasthan & another, (2012) 5 SCC 201**

8.28. <u>Affidavit of parents regarding date of birth or age of juvenile</u>---According to Sec. 7-A & 49 of the Juvenile Justice (Care & Protection of Children) Act, 2000, the affidavit of a juvenile cannot be taken into account for the determination of his age or juvenility on the date of commission of the offence. See : **Rakesh Kumar Verma vs. State of U.P. & others, 2000 (4) AWC 2722 (Allahabad—D.B.)**

8.29.<u>Affidavit of Juvenile about his age & its evidentiary value ?</u> : According to Sec. 7-A & 49 of the Juvenile Justice (Care & Protection of Children) Act, 2000, the affidavit of a juvenile cannot be taken into account for the determination of his age or juvenility on the date of commission of the offence. See : **Rakesh Kumar Verma vs. State of U.P. & others, 2000 (4) AWC 2722 (Allahabad—D.B.)**

8.30. <u>Report from medical board under rule 12 when to be sought</u> ? : Rule 12 of 2007 JJ Rules describes four categories of evidence which have been provided in which preference has been given to school certificate over medical report. Medical opinion from medical board

should be sought only when matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. Determination of age of juvenile only on the basis of medical opinion of medical board ignoring date of birth mentioned in marksheet and school certificate is not proper. See…. **Shah Nawaz Vs. State of UP and another, AIR 2011 SC 3107.**

8.31. <u>Report from medical board under rule 12 when to be sought</u> ? : According to Rule 12(3)(b), the medical opinion from a duly constituted Medical Board will be obtained only when the proof mentioned under sub-clause (i), (ii) or (iii) of clause (a) to sub-rule (3) of Rule 12 is not available. Rule 12(3)(a) is as quoted below----

(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 panchayat;

According to Rule 12(3)(b), if the 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.

In the cases noted below it has been held that while dealing with the question of determination of age of the accused for the purposes of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in border line cases. See---

1. **Ram Janam vs. State of U.P., 2003 (46) ACC 1150 (Allahabad)**
2. **Rajinder Chandra vs. State of Chhattisgarh, 2002(1) JIC 609 (SC)**

8.32.<u>Medical Board's opinion Vs. school certificate etc</u>.? Rule 12 of 2007 JJ Rules describes four categories of evidence which have been provided in which reference has been given to school certificate over medical report. Medical opinion from medical board should be sought only when matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. Determination of age of juvenile only on the basis of medical opinion of medical board ignoring date of birth mentioned in marksheet and school certificate is not proper. See…. **Shah Nawaz Vs. State of UP and another, AIR 2011 SC 3107.**

8.33.<u>Medical Evidence Vs. School Records</u> : Where school record is ambiguous and does not conclusively prove minority of accused, medical opinion assumes importance. Opinion of medical experts based on x-ray and ossification test would be given precedence over shaky evidence based on school records and plea of circumstantial interference based on concocted story set up by the father of the accused. Where the accused had committed heinous crime of raping a tender age girl of 13 year 6 months and method and manner of commission of offence indicated evil and matured skill of the accused, in the absence of reliable documentary

evidence in support of age of accused, medical evidence which indicated that accused was major would be given primacy. It is duty of courts to scrutinize plea of juvenility with extreme caution in cases involving heinous crimes to ensure that plea of minority is not employed to escape punishment. See…. **Om Prakash Vs. State of Rajasthan & another, (2012) 5 SCC 201**

8.34.<u>Medical Board Report versus School Certificate</u> : In case of conflict of date of birth recorded in the certificate of the school first attended and the opinion of the medical board, the date of birth recorded in the certificate from school first attended should be given preference. In terms of the provisions of Sec. 68 of the Juvenile Justice (Care & protection of Children) Act, 2000, the Central Government has framed Juvenile Justice (Care & Protection of Children) Rules, 2007. Rule 12 of the said Rules provides for the procedure to be followed in respect of determination of the age of a person. It indicates that the opinion of the Medical Board is to be preferred only when a date of birth certificate from the school first attended is not available. See---**Ram Suresh Singh vs. Prabhat Singh, AIR 2009 SC 2805**

8.35.<u>Radiological examination for purposes of age & possibility of two years error</u> : It is notorious and one can take judicial notice that the margin of error in ascertaining the age of a person by radiological examination is two years on either side. See---

1. **Ram Suresh Singh vs. Prabhat Singh, AIR 2009 SC 2805**
2. **Jaya Mala vs. Home Secretary, Government of J & K, AIR 1982 SC 1297.**

8.36.<u>Rule adding two years to the age determined by doctor not absolute</u> : where the doctor on the basis of x-ray and physical examination of the prosecutrix of offense u/s 376 IPC had opined that

prosecutrix was 17 years of age,reversing the order of the Hon'ble Allahabad High Court holding her to be 19 years of age , it has been held by the Supreme Court that there is no such rule much less absolute one that two years have to be added to the age determined by doctor. See... **State of U.P v. Chhotey Lal, AIR 2011 SC 697** (***Regarding age of prosecutrix u/s 376 IPC***).

8.37. <u>Horoscope & its evidentiary value :</u> A horoscope is very weak piece of material to prove the age of a person. The entry of Admission Register of a school as to age is more authentic evidence u/s. 32(5), Evidence Act unless shown to be inherently improbable. See--- **State of Punjab vs. Mohinder Singh, 2005 (0.2.) AWC 1009 (SC)**

8.38.<u>Horoscope must be proved by its maker</u> : Where the maker of the horoscope being dead could not be examined to prove as to what was the primary evidence of the date and time of birth, paper on which the horoscope was drawn up was not an old one, horoscope was prepared at the instance of another person and written by his brother, a bystander having nothing to do either with the preparation of the horoscope or with the writing thereof had given evidence regarding the horoscope, the Supreme Court held that the horoscope in question was not trustworthy as an evidence and could not have been looked into for any purpose whatsoever. See---**Sushil Kumar vs. Rakesh Kumar, (2003) 8 SCC 673**

8.39.<u>Entries of Electoral Roll & their evidentiary value ? :</u> Entry of age of a person recorded in electoral roll is recorded as per the statement made by the person concerned. But it is for the court to consider the said material on record in it's proper perspective. Such entries have been held by the Supreme Court as not conclusive. See--- **Sushil Kumar vs. Rakesh Kumar, (2003) 8 SCC 673**

8.40. <u>Entries of Family Register & their evidentiary value</u> ? : Extracts of family register do not indicate correct date of birth. The entries made in family register regarding the age of a person are not conclusive proof of the correctness of the date of birth. Entries in Kutumb Register cannot be relied upon for determination of age of a person without holding enquiry. See---

(i) Bahadur vs. State of U.P., 2009 (67) ACC 427 (All)

(ii) Onkar Tiwari alias Kariya vs. State of U.P., 2001 All Dand Nirnya 52 (Allahabad)

(iii) Hare Ram Chowdhary vs. State of U.P., 1990 (27) ACC 99 (Allahabad)

8.41. <u>Entries of Family Register & their evidentiary value</u> ? : In the cases of **Budh Ram Vs. State of U.P., 1993 (30) ACC 636 (All)** & **Harpal Singh and another Vs. State of H.P., AIR 1981 SC 361,** it has been held that the entries made in the family register, if produced from proper custody, should not be ignored lightly.

8.42.<u>Voter List cannot be considered for determination of age of juvenile</u> : Voter list cannot be taken to be guide for determination of age of accused. Voter list is not a document mentioned in Rule 12(3) of the JJ Rules, 2007. See : **Annu Vs. State of UP, 2013 (81) ACC 595 (All).**

8.43.<u>Entries in register of births & deaths & their evidentiary value</u> ? : As per Sec. 35, Evidence Act, while ascertaining the age of an offender, the entries contained in register of births & deaths recorded by an official in performance of his duties cannot be doubted merely on the ground that the same were not contemporaneous with the suggested date of birth of the offender. More so, when LIC policy and matriculation certificate also mentioned the same date of birth as mentioned in Register of births and deaths. See**---Santenu Mitra Vs. State of W.B., AIR 1999 SC 1587**

8.44. <u>First day to be excluded in computing period of time for legal purposes</u> : The Section 9 of General Clause Act says that in any

Central Act or Regulation made after the commencement of the General Clauses Act, 1897, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any period of time, to use the word 'to'. The principle is that when a period is delimited by statute or rule, which has both a beginning and an end and the word 'from' is used indicating the beginning, the opening day is to be excluded and if the last day is to be excluded the word 'to' is to be used. In order to exclude the first day of the period, the crucial thing to be noted is whether the period of limitation delimited by a series of days or by any fixed period. This is intended to obviate the difficulties or inconvenience that may be caused to some parties. See :

(i) **Tarun Prasad Chatterjee Vs. Dinanath Sharma, AIR 2001 SC 36 (Three-Judge Bench).**

(ii) **Manmohan Anand Vs. State of UP, (2008) 3 ADJ 106 (All).**

8.45."<u>Day"….When commences and when ends</u> ? : The day of birth of a person must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day. Legal day commences at 12 'O' clock midnight and continues until the same hour the following night. See-- **Erati Laxman vs. State of A.P., (2009) 2 SCC (Criminal) 15.**

8.46. <u>Fraction of a day or a Legal Day when complete?</u>--- The day of birth of a person must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day. Legal day commences at 12 'O' Clock midnight and continues until the same hour the following night. See-- **Erati Laxman vs. State of A.P., (2009) 2 SCC (Criminal) 15.**

8.47.<u>In border line cases as to age, benefit to be extended to juvenile</u> : According to Rule 12(3)(b) of the Juvenile Justice (Care &

Protection of Children) Rules, 2007, if the exact assessment of the age of a person cannot 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.** In the cases noted below it has been held that in a doubtful case of age, court should lean in favour of the juvenile and extend the benefit of the Act by holding him juvenile----

(i) Ram Janam vs. State of U.P., 2003 (46) ACC 1150 (All)

(ii) Rajinder Chandra vs. State of Chhattisgarh and another, 2002 SCC (Criminal) 333

(iii) Kali Prasad Patwa and another vs. State of U.P., 2002(1) UPCrR 401

9. <u>Protection Of Children From Sexual Offences Act, 2012</u> : In the case noted below, the Hon'ble Supreme Court has held that persons guilty of non reporting of sexual offences against children should be prosecuted for screening offenders. State and Central government have been directed to constitute Special Juvenile Police Units. See : **2013 CrLJ 2595 (SC).**

10(A). <u>Model order deciding custody of major girl</u> :

न्यायालय न्यायिक मजिस्ट्रेट, कक्ष संख्या–2, लखनऊ।

राज्य प्रति अशोक कुमार

अपराध संख्या– 315/2013
धारा 363, 366, 376 भा.द.सं.
थाना–गोमतीनगर, जनपद–लखनऊ

<u>आदेश</u>

20—9—2013

अपराध संख्या 315/2013 थाना—गोमतीनगर, जनपद : लखनऊ, धारा 363, 366, 376 भा.द.सं. के प्रकरण में अपहृता/पीड़िता को नारी निकेतन में रखे जाने के लिए अथवा उसकी अभिरक्षा के बारे में आदेश पारित किये जाने हेतु विवेचक द्वारा आवेदन प्रस्तुत किया गया है। विवेचक द्वारा अपहृता/पीड़िता को न्यायालय के समक्ष प्रस्तुत किया गया है।

विद्वान सहायक अभियोजन अधिकारी, विवेचक, अपहृता/पीड़िता तथा अपहृता के पिता एवं उनके विद्वान अधिवक्ता को सुना तथा विवेचक द्वारा प्रस्तुत आवेदन, अपहृता/पीड़िता का धारा 164 द.प्र.सं. के अन्तर्गत मजिस्ट्रेट द्वारा अंकित बयान, चिकित्सीय परीक्षण की रिपोर्ट, अपहृता/पीड़िता के पिता द्वारा प्रस्तुत आपत्तियॉ एवं केस डायरी का अवलोकन किया ।

अपहृता/पीड़िता के पिता द्वारा दिनांक 20.08.2013 को अभियुक्त राजेश कुमार के विरूद्ध थाना गोमती नगर, जनपद लखनऊ पर इस आशय की प्रथम सूचना रिपोर्ट अंकित करवाई गयी थी कि उक्त अभियुक्त वादी की पुत्री/पीड़िता, जो अवयस्क है और जिसकी आयु मात्र 15 वर्ष है, को बहला—फुसलाकर भगा ले गया और अभियुक्त उसके साथ कोई गंभीर आपराधिक कृत्य करना चाहता है । पीड़िता के पिता ने उसे अपनी अभिरक्षा में दिये जाने का अनुरोध किया है । प्रकरण की विवेचना करते हुए विवेचक द्वारा दिनांक 19.09.2013 को पीड़िता को कानपुर शहर स्थित एक होटल से अभियुक्त के साथ पकड़ा जाना कहा गया है । पीड़िता का आज ही अपर मुख्य न्यायिक मजिस्ट्रेट, कक्ष संख्या—5, लखनऊ द्वारा धारा 164 द.प्र.सं. के अन्तर्गत बयान अंकित किया गया है जिसमें पीड़िता ने अभियोजन कथानक का खण्डन करते हुए अपनी आयु 20 वर्ष होना कहा है और अपनी इच्छा से उक्त अभियुक्त के साथ जाना कहा है । पीड़िता का यह भी कथन है कि उसके पिता/वादी से उसकी जान को गंभीर खतरा है और वह अभियुक्त के ही साथ जाना चाहती है और उससे विवाह करना चाहती है । पीड़िता ने आज इस न्यायालय के समक्ष भी यही कथन किया है कि उसके पिता से उसकी जान को खतरा है और वह अपने पिता के साथ नहीं जाना चाहती है ।

पीड़िता के पिता/वादी की ओर से पीड़िता के अवयस्क होने के बारे में केवल अपना शपथ—पत्र प्रस्तुत किया गया है परन्तु कोई अन्य दस्तावेजी साक्ष्य आदि नहीं प्रस्तुत किया गया है जिससे इस आशय का प्रमाण मिलता हो कि पीड़िता वास्तव में अवयस्क है अथवा कि वर्तमान में उसकी आयु मात्र 15 वर्ष है जबकि अभियोजन पक्ष की ओर से पीड़िता का सिविल अस्पताल, लखनऊ में चिकित्सीय परीक्षण करवाये जाने के उपरान्त उसकी चिकित्सीय परीक्षण की रिपोर्ट एवं एक्स—रे रिपोर्ट/एक्स—रे प्लेट भी प्रस्तुत की गयी है जिसमें पीड़िता की आयु लगभग 19 वर्ष होना कही गयी है । धारा 164 द.प्र.सं. के अपने बयान में भी पीड़िता ने अपने को वयस्क कहते हुए अपनी आयु 20 वर्ष होना कहा है । अतएव उपलब्ध साक्ष्य के आधार पर पीड़िता को वयस्क होना पाया जाता है । पीड़िता के पिता/वादी की आपत्तियॉ बलहीन पाते हुए निरस्त की जाती हैं ।

चूँकि पीड़िता की आयु लगभग 19 वर्ष है और वह वयस्क है, अतएव **ज्ञान देवी**

प्रति सुपरिण्टेण्डेण्ट नारी निकेतन, दिल्ली, (1976) 3 एससीसी 234 (तीन सदस्यीय पीठ) एवं लता सिंह प्रति उ0प्र0 राज्य, 2006 ए.एल.जे. 357 (सुप्रीम कोर्ट) के मामलों में मा0 उच्चतम न्यायालय द्वारा प्रतिपादित किये गये विधि के आलोक में पीड़िता को उसकी इच्छा के अनुसार कहीं भी और किसी के भी साथ जाने के लिए स्वतंत्र किया जाता है । विवेचक का आवेदन तदनुसार निस्तारित किया जाता है ।

ह0/–
(रमेश कुमार)
न्यायिक मजिस्ट्रेट,
कक्ष संख्या–2, लखनऊ।
20–9–2013

ह0/पीडिता

ह0/विवेचक

ह0/अधिवक्ता

ह0/ए0पी0ओ0

10(B). Model order sending a minor girl into custody of her parents :

न्यायालय न्यायिक मजिस्ट्रेट, कक्ष संख्या–2, लखनऊ।

राज्य प्रति अशोक कुमार

अपराध संख्या– 315/2013
धारा 363, 366, 376 भा.द.सं.
थाना–गोमतीनगर, जनपद–लखनऊ

आदेश

20–9–2013

अपराध संख्या 315/2013 थाना–गोमतीनगर, जनपद : लखनऊ, धारा 363, 366, 376 भा.द.सं. के प्रकरण में अपहृता/पीड़िता को नारी निकेतन में रखे जाने के लिए अथवा उसकी अभिरक्षा के बारे में आदेश पारित किये जाने हेतु विवेचक द्वारा आवेदन प्रस्तुत किया गया है। पीड़िता के पिता/वादी द्वारा पीड़िता को अवयस्क कहते हुए उसे अपनी अभिरक्षा में दिये जाने हेतु आवेदन प्रस्तुत किया गया है । विवेचक द्वारा अवयस्क अपहृता/पीड़िता को न्यायालय के समक्ष प्रस्तुत किया गया है।

विद्वान सहायक अभियोजन अधिकारी, विवेचक, अपहृता/पीड़िता तथा अपहृता के पिता एवं उनके विद्वान अधिवक्ता को सुना तथा विवेचक द्वारा प्रस्तुत आवेदन, अपहृता/पीड़िता का धारा 164 द.प्र.सं. के अन्तर्गत मजिस्ट्रेट द्वारा अंकित बयान, चिकित्सीय परीक्षण की रिपोर्ट, अपहृता/पीड़िता के पिता द्वारा प्रस्तुत आपत्तियॉ व स्कूल सर्टीफिकेट एवं केस डायरी का अवलोकन किया ।

अपहृता/पीड़िता के पिता द्वारा दिनांक 20.08.2013 को अभियुक्त राजेश कुमार के विरूद्ध थाना गोमती नगर, जनपद लखनऊ पर इस आशय की प्रथम सूचना रिपोर्ट अंकित करवाई गयी थी कि उक्त अभियुक्त वादी की पुत्री/पीड़िता, जो अवयस्क है और जिसकी आयु मात्र 15 वर्ष है, को बहला–फुसलाकर भगा ले गया और अभियुक्त उसके साथ कोई गंभीर आपराधिक कृत्य करना चाहता है । पीड़िता के पिता ने उसे 15 वर्षीय अवयस्क कहते हुए अपनी अभिरक्षा में दिये जाने का अनुरोध किया है । प्रकरण की विवेचना करते हुए विवेचक द्वारा दिनांक 19.09. 2013 को पीड़िता को कानपुर शहर स्थित एक होटल से अभियुक्त के साथ पकड़ा जाना कहा गया है । पीड़िता का आज ही अपर मुख्य न्यायिक मजिस्ट्रेट, कक्ष संख्या–5, लखनऊ द्वारा धारा 164 द.प्र.सं. के अन्तर्गत बयान अंकित किया गया है जिसमें पीड़िता ने अभियोजन कथानक का समर्थन करते हुए अपनी आयु लगभग 16 वर्ष होना कहा है और उसकी इच्छा व सहमति के विपरीत अभियुक्त द्वारा उसे ले जाया जाना कहा है । पीड़िता का यह भी कथन है कि वह अपने माता–पिता के साथ रहना चाहती है ।

पीड़िता के पिता/वादी की ओर से पीड़िता के अवयस्क होने के बारे में अपना शपथ–पत्र तथा प्राइमरी पाठशाला, रामपुर, जनपद लखनऊ के प्रधानाचार्य द्वारा निर्गत स्कूल लीविंग सर्टीफिकेट प्रस्तुत किया गया है जिसमें पीड़िता की जन्मतिथि 27.08.1998 अंकित है जिससे इस आशय का प्रमाण मिलता है कि पीड़िता की वर्तमान में आयु लगभग 15 वर्ष है । धारा 164 द.प्र.सं. के अपने बयान में भी पीड़िता ने अपनी आयु 15 वर्ष होना कहा है । चिकित्सीय परीक्षण की रिपोर्ट में भी पीड़िता की आयु लगभग 15 वर्ष होना कहीं गयी है । किसी अन्यथा साक्ष्य के अभाव में पीड़िता की वर्तमान में आयु लगभग 15 वर्ष होना पायी जाती है और इस प्रकार वह अवयस्क है ।

चूँकि पीड़िता की आयु लगभग 15 वर्ष है और वह अवयस्क है तथा वह अपने पिता की अभिरक्षा में अपने घर जाने के लिए इच्छुक व सहमत है । अतः पीड़िता को नारी निकेतन प्रेषित किये जाने का कोई औचित्य नहीं है । पीड़िता के पिता/वादी का

आवेदन स्वीकार किया जाता है । पीड़िता को उसके पिता/वादी द्वारा निम्नांकित आशय की अण्डरटेकिंग प्रस्तुत करने पर उसकी अभिरक्षा में दिया जाता है :–

(1) पीड़िता के पिता/वादी पीड़िता को उसके वयस्क होने तक अपनी अभिरक्षा में सुरक्षित रखेंगे तथा उसके पालन–पोषण, स्वास्थ्य एवं उसके अन्य हितों को सुरक्षित रखना सुनिश्चित करेंगे ।

(2) पीड़िता को किसी भी रूप में प्रताड़ित व परेशान नहीं किया जावेगा ।

(3) पीड़िता के पिता/वादी पीड़िता को दिनांक 05.10.2013 को न्यायालय के समक्ष व्यक्तिगत रूप से उपस्थित करेंगे ताकि न्यायालय इस तथ्य से अवगत हो सके कि पीड़िता को उसके पिता/वादी की अभिरक्षा में प्रताड़ित तो नहीं किया जा रहा है ।

ह0/पीडिता

ह0/विवेचक

ह0/अधिवक्ता

ह0/ए0पी0ओ0

(4) दिनांक 05.10.2013 के उपरान्त पीड़िता के पिता/वादी द्वारा उपरोक्त प्रकरण से सम्बन्धित विवेचना/दण्ड वाद के लम्बित रहने तक अथवा पीड़िता के वयस्क होने तक पीड़िता को प्रत्येक चार माह पश्चात प्रथम कार्य दिवस पर न्यायालय के समक्ष व्यक्तिगत रूप से प्रस्तुत करेंगे ताकि न्यायालय इस तथ्य से अवगत हो सके कि पीड़िता को उसके पिता/वादी की अभिरक्षा में प्रताड़ित आदि तो नहीं किया जा रहा है ।

(5) विवेचक अथवा न्यायालय के आदेश पर पीड़िता के पिता द्वारा विवेचना अथवा न्यायिक प्रयोजनों हेतु आदेशित किये जाने पर पीड़िता को अपने व्यय पर विवेचक अथवा न्यायालय के समक्ष प्रस्तुत किया जावेगा ।

(6) वयस्कता की आयु 18 वर्ष पूर्ण कर लेने पर पीड़िता के पिता/वादी की अभिरक्षा स्वतः समाप्त हो जायेगी और पीड़िता अपनी इच्छा के अनुसार कहीं भी जाने के लिए स्वतन्त्र होगी ।

पीड़िता के पिता/वादी द्वारा उपरोक्त आशय की अण्डरटेकिंग आज ही प्रस्तुत की जावे और तदुपरान्त पीड़िता को उसके पिता/वादी की अभिरक्षा में सौंप दिया जावे ।

ह0/–
(रमेश कुमार)
न्यायिक मजिस्ट्रेट,
कक्ष संख्या–2, लखनऊ।
20–9–2013

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