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A CASE FOR DIFFERENT STANDARDS IN AGE DETERMINATION PROCEEDINGS

—Shivani Misra and Dr. Anup Surendranath*

Abstract — The absence of a clear statutory process for age determination of victims has resulted in inconsistent judicial outcomes that lack a principled approach and dilute the standard of proof requirements intrinsic to criminal trials. This paper explores the feasibility of transposing the method for age determination of an offender provided under the Juvenile Justice Acts to the determination of the age of a victim in the context of criminal trials where the victim’s age creates a new substantive offence. This, it is argued, is inconsistent with the text of the various Juvenile Justice Acts, their purpose, and judicial precedent. The paper explores the nature of these inconsistencies as they occur during the process of age determination in criminal trials and finds that the variations are a result of differences in the understanding and application of the law. The paper argues that the standard of proof for determining the age of a child in conflict with law cannot be applied to determine the age of a victim and the latter needs to adhere to a higher evidentiary standard given its bearing upon the rights of an accused.

I. INTRODUCTION

Age is an important indicator of criminal liability in cases that involve children in conflict with law and minor victims. It determines the mode of trial and the quantum of punishment. For a person accused of an offence against a minor, the age of the victim determines the substantive offence for which the accused will be tried. Consequently, age determination processes form a crucial part of the criminal justice system and are undertaken both for an offender with a juvenility claim and for a minor victim. The law as it stands provides for different methods to determine the age of juveniles in conflict with the law and minor victims. This leads to questions on the procedures used to determine age in the two contexts.

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While there is a clear basis for determining the age of a child in conflict with law, there is no clear statutory method provided for undertaking such an inquiry with respect to the age of a minor victim. Section 94¹ of the Juvenile Justice (Care and Protection of Children) Act, 2015 governs the age determination procedure with respect to a child in conflict with law². It enumerates the kinds of documents which may be presented as proof of age and sets out when a medical examination is to be ordered. Such statutory procedure is absent in case of a minor victim. As a result of this, judicial outcomes lack consistency and remain silent on questions such as when is a certain method for age determination preferred over another and what is the best method for comprehensively determining the age of a victim. This has far reaching consequences for an accused who is otherwise entitled to benefit of the doubt and against whom guilt is to be proved beyond a reasonable doubt. Age of victims in certain cases creates a new substantive offence which usually has heightened punishment. For instance, the maximum sentence for abetment of suicide of a child is death,³ whereas it is 10 years⁴ imprisonment in case of a major. Trafficking of a minor under Section 370 (4) of the Indian Penal Code (the 'IPC') is punishable with a minimum of 10 years imprisonment and can extend to life imprisonment; this is otherwise punishable with 7 to 10 years imprisonment.⁵ Recent amendments to the IPC⁶ and the Protection of Children from Sexual Offences

¹ The Juvenile Justice (Care and Protection of Children) Act 2015, s 94 reads “(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.”

² The application of s 94 extends to a child in need for care and protection whose age is determined by the Child Welfare Committee.

³ Indian Penal Code, 1860 s 305 ('IPC')

⁴ IPC, s 306

⁵ IPC, s 370 (2)

⁶ The Criminal Law (Amendment) Act 2018, s 5. Insertion of IPC, s 376AB which states “Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.”

Act (the ‘POCSO Act’)⁷ have also introduced the death penalty for non-homicidal sexual offences. Further, the POCSO Act also requires a court to presume that the accused has committed the offence unless the contrary is proved⁸ after the prosecution establishes foundational facts, including age of the victim. Thus, one may validly ask what the standard of proof should be in age determination proceedings in the context of an offender and a victim. This paper seeks to answer this question by considering whether or not the absence of a well-defined procedure for age determination of a victim dilutes the standard of proof required to establish the age of a victim. And if so, how must the law evolve to address these concerns.

The Supreme Court attempted to bridge this doctrinal gap by extending the process for age determination of a child in conflict with law to a minor victim.⁹ Part II of the paper explores this possibility and analyses the impact of having the standard under the Juvenile Justice Act for the victim of a crime. This extension, it is argued, is not desirable as it does not engage with attendant questions of burden of proof and standard of proof. Section 94 of the Juvenile Justice Act, 2015 is clear in its expression and does more than laying down the kinds of documents which may be adduced as evidence in an age determination inquiry. The provision also sets out the probative value of the evidence and has a direct bearing on the question of standard of proof. For instance, under Section 94 the presence of a valid document is enough to accept a claim of juvenility and the concerned authority need not question the correctness of the document.¹⁰ The standard of proof is distinctly low and applying this to the prosecution for proving the age of a minor victim would take away from the rights of an accused to a fair trial¹¹ and the standard of proving guilt beyond reasonable doubt.

Part III of the paper looks into the provisions of age determination under the POCSO Act. Section 34 of the said Act is widely worded and leaves the method for age determination to the discretion of courts. Courts therefore adopt methods that suit the facts and circumstances of the case before them. An analysis of the existing judgments for offences under the POCSO Act and offences against minors under the IPC demonstrates that the discretion helps

⁷ The Protection of Children from Sexual Offences (Amendment) Act 2019, s 5. S 6 of the POCSO Act now states “6. (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death. (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

⁸ POCSO Act, ss 29-30.

⁹ *Jarnail Singh v State of Haryana* (2013) 7 SCC 263 (‘Jarnail Singh’); *Mahadeo v State of Maharashtra and Ors.* (2013) 14 SCC 637 (‘Mahadeo’).

¹⁰ *Ashwani Kumar Saxena v State of Madhya Pradesh* (2012) 9 SCC 750 (‘Ashwani Kumar Saxena’).

¹¹ *Zahira Habibullah Sheikh v State of Gujarat* (2006) 3 SCC 374 (396); *Kalyani Baskar v M.S. Sampooram* (2007) 2 SCC 258 (262).

courts circumvent challenges inherent to the age determination exercise. For example, documentary evidence presented before the courts by the prosecution for establishing the age of a minor victim needs to be proved carefully. These documents are easily imprisoned for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean susceptible to incorrect information and may not be an accurate indicator of the *true* age. Thus, courts have encouraged cross examination of makers of the documents to ascertain the basis on which age was recorded. The absence of documents and conflicting entries in different documents is also not uncommon. In such a situation, courts rely on medical evidence. Placing reliance on medical evidence is not bereft of complications as medical tests are inconclusive in nature. Further, the tests have not been consistently applied. While most decisions focus on bone ossification tests many others consider only the development of secondary sexual characteristics or dental examination. The inconclusiveness of bone ossification tests is addressed by acknowledging a margin of error of two years on either side; however, no questions have been raised on the scientific accuracy of the tests to adequately determine age. The result of this is that there is no underlying normative basis for courts to reasonably apply the discretion vested on them. This, it is argued, has unintentionally resulted in skewing from the standard of proof on the prosecution to prove the age of a victim. It is reiterated that this standard is high and needs to be strictly discharged.

There is a need for a principled approach to deal with questions on age determination and individual liberty should not be dictated by arbitrary standards. Therefore, clarity is desirable on various fronts. Part IV looks at the question of how the standard of proof should evolve for age determination proceedings. The paper argues against the possibility of having a high standard of proof requirement both for the victim and a child in conflict with law. This, it is felt, would go against the mandate of the Juvenile Justice Act which is essentially a beneficial piece of legislation aiming to adopt a child friendly approach in adjudicating matters against children in conflict with law. Having a uniform low standard is also not desirable as it dilutes the standard of proof on the prosecution. Thus, the paper concludes that the standard of proof requirement for proving the age of a child in conflict with law needs to be imagined differently from that of a victim. It is dependent directly on the impact on individual liberty and therefore, is high on the prosecution to establish the age of a victim whereas it is low when an individual claims juvenility under the Juvenile Justice Act. Consequently, benefit of the doubt should be extended to a minor who claims juvenility and also to an accused where the age of the victim impacts the quantum of punishment.

II. AGE DETERMINATION UNDER THE JUVENILE JUSTICE ACTS

By examining the age determination procedures under the Juvenile Justice Act 2000 (and also the 2015 Act), the argument in this section is that such procedures cannot be used to determine the age of a victim in criminal trials. This argument is based on two grounds: a) textual interpretation of the Juvenile Justice Acts of 2000 and 2015 both limit the context in which the age determination procedures under those legislations can be used; b) the prosecution cannot rely on procedures under the Juvenile Justice Acts to discharge its burden in a criminal trial as they were meant as beneficial procedures to account for the vulnerability of children. This cannot then be used to impose a lower standard of proof on the prosecution while establishing the age of the victim in a criminal trial. However, this section also argues that the failure of the prosecution to establish the age of victim ‘beyond reasonable doubt’ cannot preclude the victim from claiming benefit of a lower standard of proof for ‘care and protection’ under the Juvenile Justice Act.

At first this section looks at the provisions of the Juvenile Justice Act, 2000 in order to ascertain the scheme of the age determination proceedings and the requirements thereunder; emphasis is then laid on the manner in which the Supreme Court attempted to adopt the said scheme in the context of age determination by the prosecution for a victim. This adoption, it is argued, has ignored evidence appreciation procedures that are to be followed in criminal trials. Finally, the section concludes that the scheme of the Juvenile Justice Act, 2015, irrespective of whether it is a child ‘in conflict with law’ or a child ‘in need of care and protection’, further reinforces the argument that age determination proceedings under the Act are only for the purposes of the Juvenile Justice Act.

Age determination of a person claiming to be a juvenile is crucial for the implementation of the Juvenile Justice Act which was enacted with the intention to consolidate and amend the law relating to children who are either alleged or found to be in conflict with law and children who are in need of care and protection.¹² The processes under the Juvenile Justice Act are designed to suit its legislative requirements and cannot simply be transported to a different context i.e., the context of the prosecution seeking to establish the victim’s age. Evidence led by the prosecution to establish the age of a victim in a criminal trial needs to be proved in terms of the Indian Evidence Act, 1872 (the ‘IEA’); however, the text of the Juvenile Justice Act and its interpretation by courts shows that the requirements under the IEA are substantially (and appropriately) diluted when a person raises a claim of juvenility.¹³

¹² The Juvenile Justice (Care and Protection of Children) Act 2015, Object and Purpose.

¹³ A different approach has been taken by Urmi Chudgar, Bahuli Sharma & Bharti Ali, ‘Handbook for Public Prosecutors: Issues under the PocsO Act: A Compilation of Legal Cases

The Juvenile Justice Act applies to children who are in conflict with law and children who are in need for care and protection. The Act creates a threshold for proof of age for any child falling under these categories which is distinct from the threshold which needs to be satisfied by the prosecution. A child who is in need for care and protection may, in certain cases, also be a victim in a criminal prosecution.¹⁴ However, the age determination inquiry in both contexts for the same child would be different. While in the former case, the burden is different and the lenient standard under the Juvenile Justice Act would be applicable; in the latter case a higher standard needs to be satisfied by the prosecution which has to establish the age of the victim beyond reasonable doubt.

In order to ascertain whether the procedure for age determination prescribed under the Juvenile Justice Act can be applied to the prosecution to prove the age of a victim, it is necessary to examine the procedure in the context within which it was enacted. The Juvenile Justice Act, 2015 aims at adopting a child friendly approach in adjudication and disposal of matters in the best interest of children thereby furthering India's international obligations under the Convention on the Rights of the Child¹⁵ and other treaties.¹⁶ This is in similar vein to the objectives of the Juvenile Justice Act, 2000 and reflects the underlying legislative intent in providing a protective environment for the interaction of minors and the criminal justice system. In *Arnit Das v. State of Bihar*,¹⁷ the Supreme Court, while consolidating decisions on the Juvenile Justice Act, 2000 indicated approval of the principle that a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of a juvenility plea. The Court further stated that if two views are possible on the same evidence, courts should lean towards accepting the juvenility plea. While the ratio in *Arnit Das* on the relevant date for applicability of the Act was overruled by a constitution bench in *Pratap Singh v. State of Jharkhand*,¹⁸ its observations on the interpretation of the Juvenile Justice Act quoted above stand as good law.¹⁹ In fact, elucidating on the nature of

and Facts' (HAQCRC, December 2019) <www.haqcrc.org/wp-content/uploads/2019/12/handbook-for-pps-on-csa-1.pdf>. The work argues that the processes under the Juvenile Justice Acts can be used for age determination of victims under the POCSO Act as both legislations are *pari materia*.

¹⁴ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2 (14) (viii).

¹⁵ Convention on the Rights of the Child (adopted 30 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The Government of India acceded to the Convention on the Rights of the Child on 11 December 1992.

¹⁶ UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules": resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33; UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/113.

¹⁷ (2000) 5 SCC 488.

¹⁸ (2005) 3 SCC 551.

¹⁹ *Shah Nawaz v State of U.P.* (2011) 13 SCC 751; *Abuzar Hossain v State of W.B.* (2012) 10 SCC 489 ('Abuzar Hossain').

the enactment, the bench in *Pratap Singh* stated that the Act is a piece of beneficial legislation which needs to be interpreted to advance the cause of the legislation for the benefit of whom it is made and not to frustrate the intentment of the legislation.²⁰

A. Procedure under the Juvenile Justice Act, 2000

Presumption and determination of age of a child in conflict with law or in need of care and protection under the Juvenile Justice Act 2000 is governed by Section 49²¹ which empowers the competent authority to undertake an age determination inquiry. This has to be read with Rule 12 of the Juvenile Justice Rules, 2007 which prescribes the procedure to be followed in age determination proceedings. Both documentary and medical evidence can be sought by the Court, Juvenile Justice Board or the Child Welfare Committee to ascertain age as provided under Rule 12 (3).²² Further, an age determination inquiry may also be sought by a court before which a juvenility claim is raised under Section 7A of the Juvenile Justice Act, 2000. There are two contexts in which age determination inquiries are undertaken under the Juvenile Justice Act, 2000; *first*, if a claim is made before the Child Welfare Committee or the Juvenile Justice Board, Rule 12 is applicable and documents listed therein can

²⁰ See also, *Jyoti Prakash Rai v State of Bihar* (2008) 15 SCC 223.

²¹ The section reads as follows: “49. Presumption and determination of age (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority 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.”

²² The provision reads as follows “(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; the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; 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.”

be used adduced to prove age; *second*, if a claim is raised before a court under Section 7A. In the latter case, certain *prima facie* evidence is produced before the court after which the court decides whether or not it will hold an inquiry under Rule 12.

A bare reading of Rule 12 reveals that documents which can be adduced to support a juvenility claim are listed in order of preference; *first*, the matriculation or equivalent certificates, *second*, the date of birth certificate from the school first attended by the applicant, and *finally* in its absence, the birth certificate given by a corporation, municipal authority or a panchayat. It is only in the absence of all three forms of documentary evidence mentioned above that a medical opinion can be sought to ascertain the age of the juvenile. The use of words ‘in its absence’ segregating each piece of documentary evidence which may be led shows that the presence of an admissible document is enough to determine age and the provision does not warrant an examination of the probative value of the document so produced. This reading is further reinforced by the text of Rule 12 (3) which uses the language ‘by seeking evidence by obtaining’. This is qualitatively different from stating “by proving” the documents listed in the provision. The document in and of itself is accepted as evidence and there is no further need to examine the underlying basis on which information was recorded in the document. This, as is argued subsequently, substantially strays from the standard of proof otherwise required in criminal cases which necessitates such a deeper evidentiary inquiry.

The nature and import of an age determination inquiry under the Juvenile Justice Act 2000 was explained by a division bench of the Supreme Court in *Ashwani Kumar Saxena*²³ in which the appellant who was charged with murder claimed juvenility before the Chief Judicial Magistrate. Evidence in favour of the claim was in the form of attested marksheets of the Board of Higher Education, depositions of parents of the appellant and a horoscope. Medical opinion was also sought and two doctors opined that the appellant was above 18 years of age. In the absence of examination of the teacher who made the records, the Chief Judicial Magistrate²⁴, Sessions Court²⁵ and the High Court²⁶ placed reliance on the medical opinion and rejected the juvenility claim. On appeal, the Supreme Court accepted the juvenility claim based on the school certificates presented and stated that the Court, Juvenile Justice Board or a Committee functioning under the Juvenile Justice Act is not expected to conduct a *roving enquiry* to examine the correctness of documents kept during the normal course of business.²⁷ The Court held a medical opinion could be sought only when the documents or certificates are found to be fabricated or

²³ *Ashwani Kumar Saxena* (n 10).

²⁴ *Ibid* (8).

²⁵ *Ibid* (9-10).

²⁶ *Ibid* (11).

²⁷ *Ibid* (34).

manipulated. The reasoning behind this, as per the Court, is the fact that an inquiry contemplated under Section 7A of the Juvenile Justice Act, 2000 is different from that under the CrPC and the former is to be conducted strictly according to the specific procedure laid down in the Juvenile Justice Rules.²⁸ Thus, the decision establishes that Rule 12 differs in the way it requires evidence to be appreciated and while so doing sets out a different standard of proof requirement. The decision in *Ashwani Kumar Saxena* has been applied by the Supreme Court²⁹ and High Courts which have refused to verify the correctness of documents presented before them in support of a juvenility claim.³⁰

However, this decision does not preclude examination of the validity of a document. The nature of the roving inquiry disapproved in *Ashwani Kumar Saxena* pertains to examination of the probative value of the documents and not the admissibility or correctness of the documents. The distinction lies in a false document being presented as proof of age and a valid document being presented where the basis of information recorded is not examined to ascertain if the document is reflective of the true age. For instance, a document may be forged or a document may be based on information that is not accurate. While under Rule 12 an inquiry in the case of forgery³¹ or manipulation³² of the document can be made, the Rule does not permit an inquiry in the latter case. This is so as allegations of forgery go to the root of admissibility of a document. This position has subsequently been clarified by larger benches of the Supreme Court. In *Abuzar Hossain v. State of W.B.*³³, the court held that the credibility of the documents adduced after conviction in support of a juvenility plea would depend on the particular facts of each case. This proposition has also been quoted with affirmation in *Sanjeev Kumar Gupta v. State of UP*³⁴ where the dispute was with respect to the admissibility of the document given different entries in other documents. However, it must be noted that in both these decisions there were conflicting dates of birth in different documents produced. The question therefore, was not on the nature of proof required to prove a document but which document must be accepted when there are conflicting entries.

Under Section 7A of the Juvenile Justice Act, 2000 the Court before which a claim of juvenility is raised may call for an inquiry if some material is produced to *prima facie* substantiate the need for an inquiry in terms of Section

²⁸ *Ibid* (26)-(30).

²⁹ *State of Bihar v Chotu Patel* (2105) 17 SCC 660; *Jodhbir Singh v State of Punjab* (2012) 13 SCC 591.

³⁰ *Sunil Kumar Yadav v State of West Bengal* 2018 SCC OnLine Cal 15469; *Uday Kumar Yadav v State (NCT of Delhi)* 2015 SCC OnLine Del 7255; *Ku. Gikita Sahu v State of Chhattisgarh and ors* 2014 SCC OnLine Chh 204.

³¹ *Kulai Ibrahim v State* (2014) 12 SCC 332.

³² *Parag Bhati v State of U.P.* (2016) 12 SCC 744.

³³ *Abuzar Hossain* (n 19).

³⁴ (2019) 12 SCC 370.

49 read with Rule 12. There is no cataloguing of what may constitute as *prima facie* proof that necessitates an inquiry.³⁵ Thus, the position as it stands is that where evidence adduced by a person before a Court *prima facie* supports the plea of juvenility, it is necessary for the Court to conduct an age determination inquiry. However, per *Ashwani Kumar Saxena*, the scope of such inquiry is restricted and as clarified in *Abuzar Hossain* documents in favour of juvenility must be tested for credibility. What transpires is that while authorities under the Juvenile Justice Act can refuse to accept fabricated documents, they cannot inquire into cases of *bona fide* incorrect recording of age if the genuineness of the document is not disputed.

B. Legislative Deficit and Extension of the Procedure under the Juvenile Justice Act, 2000

While age determination is an equally crucial part in a criminal trial involving a minor victim, there was no procedure prescribed by statute for undertaking such assessment. The gap emerged as a result of the Juvenile Justice Act, 2000 and the 2007 Rules which stated that age determination was for the purpose of the Act. The legislature, while being aware of the 2000 Act and 2007 Rules, chose not to adopt a similar provision for inquiries under the POCSO Act, 2013. This legislative gap has resulted in courts adopting different means to appreciate evidence produced by the prosecution for age determination. Whether the subsequent changes made under the Juvenile Justice Act, 2015 plugged this gap will be examined later in this section.

To bridge this legislative deficit, the Supreme Court in *Jarnail Singh v. State of Haryana*³⁶ directly engaged with the Juvenile Justice Act, 2000 in a case requiring the prosecution to prove the age of the victim. The Court held that though Rule 12 of the 2007 Rules was strictly applicable only to determine the age of a child in conflict with law, the provision should be the basis for determining age, even for a child who is a victim of crime. The Court held that there is hardly any difference in so far as the issue of minority is concerned between a child in conflict with law and a child who is a victim of crime.³⁷ A similar observation was recorded by a different bench of the Court in *Mahadeo v. State of Maharashtra*.³⁸ The case involved a conflict in the age determined by the school certificates presented by the prosecution to prove the age of the victim and the medical opinion, the Court referred to Rule 12 (3) (b) of the 2007 Rules to state that only in the absence of documentary evidence could medical opinion be sought. It was held that since there was a statutory rule

³⁵ *Abuzar Hossain* (n 19); *Pawan v State of Uttarakhand* (2009) 15 SCC 259.

³⁶ *Jarnail Singh* (n 9).

³⁷ *Ibid* (23).

³⁸ *Mahadeo* (n 9).

prevailing for ascertainment of the age of a juvenile, the same yardstick could be followed for the purpose of ascertaining the age of a victim as well.³⁹

The decisions in *Jarnail Singh* and *Mahadeo* came about largely to resolve the confusion emanating from the absence of a procedure for age determination of a victim; however, they do not consider attendant implications of having the same standard on rights of an accused tried for an offence against a minor. Part IV of this paper discusses the strength and validity of adopting this approach against its effect on the standard of proof required for the prosecution to establish the age of a victim.

The decisions, by themselves, have many ambiguities that do not sit well with evidentiary standards in a criminal trial. A pressing issue in following the procedure under the Juvenile Justice Act is that the provisions create a hierarchy in the documents submitted to ascertain age. Rule 12 (3) of the 2007 Rules states that evidence of age is sought by first looking at the matriculation certificate and in its absence the date of birth certificate from the school. In the absence of these documents, a birth certificate can be considered as evidence of age. The provision speaks only of the admissibility of the document and removes the requirement for establishing its probative value.

Section 35 of the Indian Evidence Act makes relevant the entries made in public record entered in performance of duty. Section 35 speaks only of the admissibility and relevancy of such documents and not the method of proof. The documents made relevant under Section 35 may be proved by a witness who deposes on the fact that the public record is regularly maintained in the ordinary course of duty. Alternatively, under Section 76, certified copies of public documents may be sought from a person in custody of a public document and the contents of a public document may be proved by the production of certified copies under Section 77.

The method of proving a document has a direct bearing on its probative value. For instance, entries made in school registers would be relevant and admissible if they fulfill the requirements of Section 35; however, their probative value is decided after examination of the basis on which the entries were made. The Supreme Court in *Birad Mal Singhvi v. Anand Purohit*⁴⁰ held that for an entry to be admissible under Section 35 of the Indian Evidence Act it must be one in a public or other official book, register or record, *secondly*, it must be an entry stating a fact in issue or a relevant fact; and *thirdly*, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. Distinguishing between the admissibility and the probative value of such a document, the Court stated that though the entry in a school register would be admissible

³⁹ *Ibid* (12).

⁴⁰ (1988) Supp SCC 604.

under Section 35, it would lack evidentiary value in the absence of materials on which such entry was made.⁴¹ Following the above dictum, the Supreme Court in *Satpal Singh v. State of Haryana*⁴² held that the probative value of an entry made in a school register would depend on who recorded the entry and what was the source of such information.

School certificates may at times not satisfy the requirements of Section 35. In the facts of *Jabar Singh v. Dinesh and Anr.*⁴³, the Supreme Court held that the entry of date of birth of the respondent in the admission form, the school records, and transfer certificates did not satisfy the conditions laid down in Section 35 of the Indian Evidence Act as it was not recorded in a 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.

The procedure under the Juvenile Justice Act deviates from this standard of proof and requires seeking of evidence by obtaining (distinguished from ‘proving’) an undisputed admissible document listed under the Act as conclusive proof of age for the purposes of that legislation. The Supreme Court in *Ashwani Kumar Saxena* has clarified that courts need not inquire about the basis on which an entry is recorded or the source of such information. Extending the restrictions to the other enactments could pervert justice and restrict the scope of an age determination inquiry which was otherwise not imagined by the legislature.

C. An Uneasy Fit with the Juvenile Justice Act, 2015

The text of Section 94 Juvenile Justice Act, 2015 departs from Rule 12 of the Juvenile Justice Rules, 2007 in certain key ways. The text of Section 94 further clarifies that the procedures provided under the Juvenile Justice Act are only for age determination for the purposes of the Act and cannot be used for proceedings in other contexts. This also brings into question the compatibility of the decisions in *Jarnail Singh* and *Mahadeo* with the text of the Juvenile Justice Act, 2015.

While Rule 12 was applicable to Courts, the Juvenile Justice Board and the Child Welfare Committee, Section 94 applies only to the Board and the Committee. There is a distinct dropping of the word “court” in Section 94 when compared with Rule 12. However, a reading of Section 9 (2) of the Juvenile Justice Act, 2015 shows that a claim of juvenility may be raised before any court and the proviso states that the claim would be decided under the provisions of the Juvenile Justice Act- i.e., under Section 94. The idea then is to

⁴¹ *Ibid* (15).

⁴² (2010) 8 SCC 714 (28).

⁴³ (2010) 3 SCC 757.

exclude the application of the procedure for any age determination claims other than those under the Juvenile Justice Act. Thus, the section is not applicable to courts which are not undertaking an age determination enquiry under the Juvenile Justice Act. This reinforces that procedures under the Juvenile Justice Act should not be lifted to other contexts and that courts before which the prosecution is to establish the age of a victim, would use their discretion in determining age by the method most suitable for the set of facts before them. This wide discretion is also given to special courts under the POCSO Act and reflects an underlying legislative intent not to restrict the power of courts in criminal trials. Therefore, it would be difficult to extend the application of the procedure under Section 94 to cases where the age of a victim needs to be established by the prosecution.

Further, the text of Section 94 Juvenile Justice Act, 2015 reinforces the fact that the age recorded by the Committee or the Board shall be deemed to be the true age of the person for the purposes of the Act. This is similar to Section 49 (2) of the Juvenile Justice Act, 2000. The provisions create a deeming fiction and interpreting this legal fiction would require understanding the purpose for its enactment. The hypothesis created by a deeming provision cannot be taken beyond what is necessary for the purpose for which it was created, or beyond the language of the section by which it is created. This further hinders application of the procedure beyond the purposes of the Act. The decisions in *Jarnail Singh* and *Mahadeo* proceed *per incuriam* Section 49 (2) of the Juvenile Justice Act, 2000. It is difficult to reconcile the decisions with the changes brought about under Section 94 of the 2015 Act which clearly restrict application of the procedure to courts beyond the Act.

III. AGE DETERMINATION OF VICTIMS

There is an absence of statutory processes that must be adopted by a court when undertaking age determination in a criminal trial. With courts not having the kind of clarity that Juvenile Justice Boards and Child Welfare Committees have under the Juvenile Justice Act 2015, judges in criminal trials have very little guidance on how their discretion to be exercised in adopting different age determination procedures. While judges tend to choose from a range of options that involve documentary and scientific evidence, there is considerable ambiguity about these methods and also inconsistency in their use. As shown above, in few cases courts have relied upon provisions of the Juvenile Justice Act to assess age of the victim. The application of the Juvenile Justice Act is not consistent as in few cases courts accept the presence of documents without undertaking a *roving inquiry* while in others there is more engagement with the basis on which information is recorded. When courts do not apply the standards under the Juvenile Justice Act, variance can be seen in the kinds of documents accepted as proof of age—courts have looked at both public and private documents substantiated by other evidence to conclusively establish age of

the victim. There are further inconsistencies on when medical opinion on age should be sought and what the margin of error should be when age is determined by medical evidence.

This section looks at the ambiguities within each of these methods and argues that the lack of a coherent basis to guide the use of discretion results in a situation where there is a lack of clarity on when documentary and medical evidence is to be accepted or rejected. It is further argued that the inconsistencies lead to dilution of the standard of proof required to be established in a criminal trial- i.e., proof beyond a reasonable doubt and consequently, fair trial rights of an accused being tried for an offence against a minor.

It must be pointed out that in a study conducted across special courts in the States of Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra it was noticed that courts often apply the standard of beyond reasonable doubt for age documents being presented by the prosecution⁴⁴ However, confusion with respect to the standard of proof applicable in age determination proceedings is still very much alive due to the ambiguous and inconsistent jurisprudence of the Supreme Court.

A. Methods of Age Determination used by Courts

Section 34⁴⁵ of the POCSO Act provides for determination of age. A reading of the provision might make it seem that it applies only to a person accused of an offence under the POCSO Act, but it has also been used to support age assessments of victims. Clause 2 states that questions on age with respect to “any person” would be determined by the Special Court. This would therefore include the victim.⁴⁶ As can be seen from a bare reading, there is no procedure

⁴⁴ Swagata Raha, “Challenges related to age determination of victims under the POCSO Act 2012” in Center for Child and the Law, National Law School of India University, Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues (National Printing Press, Bengaluru 2018).

⁴⁵ POCSO Act, s 34. The section reads as follows: 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, 2000 (56 of 2000). (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.

⁴⁶ By adopting a slightly different approach the Madras High Court in *Rajendran v State*, CrI. A.No. 483 of 2016 decided on 23.12.2016 stated that s 94 of the Juvenile Justice Act, 2015 would be applicable to age determination proceedings for a victim under s 34(1) of the POCSO Act. It is our position that s 34(1) deals with application of the Juvenile Justice Act to an offender and not to the victim. Age determination of a victim is undertaken under s 34(2) of the POCSO Act for which there is no statutory procedure provided and nor is the application of the Juvenile Justice Act contemplated.

similar to that under the Juvenile Justice Act to determine the age of the victim. Similarly, there is no age determination procedure under other enactments where age of the victim is a substantive part of the offence like the IPC, the Immoral Traffic (Prevention) Act, 1956⁴⁷ and the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.⁴⁸

The two basic modes for age determination used by courts are proof by documentary evidence and proof by a medical opinion. While broadly these are the same methods by which age is determined for a child in conflict with law, however, courts are not bound by the same rules as the Juvenile Justice Board or the Child Welfare Committee. What transpires is that there is broad unfettered discretion vested in courts to comprehensively determine the age of a victim. Such discretion may be desirable in establishing questions of fact in a criminal trial, but without a normative basis guiding the exercise of discretion there are ambiguities in its application that frustrate the purpose of the inquiry sought to be undertaken and are characteristic of an arbitrary process.

B. Inconsistencies in the Appreciation of Documentary Evidence

As has been stated in the preceding section, documents in a criminal trial are to be *proved* in terms of the Indian Evidence Act. This entails examination of witnesses to establish the probative value that is associated with a particular document. This examination is crucial as the age of minority of a victim changes the nature of the substantive offence for which an accused is tried. Age in such a situation, is an element of the offence.

The challenges with respect to documentary evidence are more acutely recognized when age is to be established by the prosecution as the scope of the age determination proceedings is wider than that for an offender. Documentary evidence may not always reflect the true age of a person as documents are susceptible to carry findings based on insufficient information or without any underlying basis. This is not to say that the document is false or fabricated but simply that the document may not be a true indicator of age. While the position is that school registers are authentic documents being maintained in the official course, and are entitled to credence of much weight unless proved otherwise⁴⁹ considering the various concerns surrounding the authenticity of

⁴⁷ S 15 (5A) reads “Any person who is produced before a Magistrate under sub-section (5), shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.”

⁴⁸ S 10 reads “Disputes as to age- If any question arises between an Inspector and an occupier as to the age of any adolescent who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such adolescent granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority.”

⁴⁹ *State of Madhya Pradesh v Preetam* (2018) 17 SCC 658.

documentary evidence⁵⁰ credibility of the documents must be ascertained in criminal trials.

Thus, in distinction to the procedure under the Juvenile Justice Act courts, while assessing the age of a victim, engage with the basis on which the document presented records information. This involves examination of persons who are familiar with the document and who can vouch for its contents. In certain cases school records have not been accepted since information regarding the date of birth was not proved.⁵¹ In *Dilip v. State of Madhya Pradesh*⁵² the Supreme Court refused to accept a school certificate presented as proof of age of the victim in a prosecution under Section 376 IPC by stating that it was not strong and material evidence as it was not adequately proved by the testimony of the teacher and the father of the victim examined before the Trial Court. In *State of Madhya Pradesh v. Munna*⁵³ reliance was not placed on the school certificate as even though the school Principal was examined, in his cross-examination he stated that the age of the victim was noted at the time of admission but he had no knowledge about the fact as to what date of birth would have been mentioned in her letter of declaration. Examination of the doctor who conducted the medical examination of the victim after the incident did not satisfactorily support the prosecution story. Thus, while school certificates and entries made in school registers are admissible as evidence of age, they are not conclusive and require corroboration.⁵⁴

However, there exist another set of judgments in which the court undertakes an age determination enquiry as per the provisions of the Juvenile Justice Act. The normative issues in adopting such a process have been set out in Part II. This section argues that even otherwise the Juvenile Justice Act has not been followed consistently. Many cases follow the dicta in *Ashwani Kumar Saxena* and do not examine the basis on which information in documents is recorded. For instance, in the case of *Debabrata Sahoo v. State of Odisha*,⁵⁵ the High Court of Odisha was adjudicating a case where age of the victim was sought to be established by three documents viz, Matriculation Certificate, Aadhar card and Report of Anganwadi Kendra. The matriculation certificate established the victim to be a minor whereas the other two documents proved her to be above 18 years. Without examining the credibility of the documents independently, the High Court relied on the date in the matriculation certificate. Section 94 of the Juvenile Justice Act and Supreme Court decisions were cited to state that

⁵⁰ (2006) 1 SCC 283; *Umesh Chandra v State of Rajasthan* (1982) 2 SCC 202.

⁵¹ *Ram Deo Chauhan v State of Assam* (2001) 5 SCC 714.

⁵² (2013) 14 SCC 331.

⁵³ (2016) 1 SCC 696.

⁵⁴ *State of Chhattisgarh v Lekhram* (2006) 5 SCC 736.

⁵⁵ Criminal Appeal 71 of 2020 decided on 30.07.2020 (High Court of Orissa) ('*Debabrata Sahoo*').

Section 94 creates a preferential regime in the documents it enlists.⁵⁶ Other courts have referenced the age determination provisions under the Juvenile Justice Act while accepting documents enlisted there as proof of age and have also examined the basis on which the age was recorded. For instance, in *Pradeep Kumar v. State of Punjab*⁵⁷ the principal of the school of the victim proved the date of birth certificate from the school which had her signature and also an attested copy of the admission and withdrawal register.⁵⁸

These decisions show that the Juvenile Justice Act is quoted only to give an added layer of credibility to the documents adduced. The courts have not carefully examined if the Juvenile Justice Act in terms of its statutory language permits examination into the underlying basis of information on which age is recorded. The requirement under the Juvenile Justice Act is to “seek evidence by obtaining” which, as argued above, qualitatively differs from proving the document. Thus, there is ambiguity with respect to documents which may be produced and the level of scrutiny required to be undertaken for proving the probative value of the evidence.

C. Inconclusivity of Medical Opinions

Reliance on medical opinions in age determination proceedings, irrespective of whether it is for an offender or a victim, suffer from a major limitation as the processes undertaken to form the medical opinion are inconclusive. This is the reason that medical opinions are not sought in the presence of unimpeachable documentary evidence.⁵⁹ Most commonly medical opinions are formed by bone ossification tests which provide a range within which age might lie. Other tests, like matching of secondary sexual characteristics also suffer from limitations and cannot be said to be conclusive proof of age. This section highlights the issues in appreciating medical evidence on age, especially that relating to extending benefit of the doubt.

A medical opinion on the age of a person is an expert opinion in terms of Section 45 IEA and is only of advisory nature.⁶⁰ Courts are not bound to accept it and must be made aware of the underlying scientific basis undertaken

⁵⁶ See also, *Prayagraj Nayak v State of Odisha*, Criminal Appeal 355 of 2019 decided on 10.08.2020 (High Court of Orissa) (*‘Prayagraj Nayak’*).

⁵⁷ CRA-D-1158-DB-2018 (O&M) decided on 17.03.2020 (High Court of Punjab and Haryana) (*‘Pradeep Kumar’*).

⁵⁸ See also, *Guruprasad v The State of Maharashtra* 2019 SCC OnLine Bom 1188 (*‘Guruprasad’*); *Imran Gani Mujavar v State of Maharashtra* Criminal Appeal 724 of 2016 (*‘Imran Gani Mujavar’*); *Ashok Dashrath Kaklij v. State of Maharashtra* Criminal Appeal 782 of 2016 (*‘Ashok Dashrath Kaklij’*).

⁵⁹ In a study conducted by the Centre for Child and the Law it was noticed that in Delhi and Assam, Investigating Officers routinely ask for medical evidence of age despite birth certificates being available. CCL Study (n 44) (95).

⁶⁰ *Ramesh Chandra Agarwal v Regency Hospital* (2009) 9 SCC 709.

to form the opinion. The judicial discourse around medical opinion has seen acknowledgment of courts on the limitations of an ossification test. The position of medical opinions has been summarised in *Babloo Pasi v. State of Jharkhand*⁶¹ where the Supreme Court stated that the opinion of a medical board is not a conclusive proof of age and is no more than an opinion. The Court held that while ossification tests were useful guiding factors for determining age, they were not incontrovertible. Similar findings were recorded in *State of Madhya Pradesh v. Anoop Singh*⁶² which held that ossification tests were not the sole criteria to determine the age of a person. These judgments acknowledge that there is a margin of error of two years on either side of the range estimated by bone ossification tests. The issue becomes more acute when the upper and lower ages provided in the range of age under the medical opinion fall within the fringe areas of juvenility. A decision then needs to be made on whether the upper age or the lower age is to be considered. In *Shweta Gulati v. State (Govt of NCT of Delhi)*,⁶³ the question before the Delhi High Court was whether the benefit of doubt in age estimated by the ossification test is to go to the accused or to the victim. Age, in this case, was estimated to be between 17-19 years. The Court held that applying the margin of error principle of two years on either side the age of the victim could be between 15 to 21 years. The Court reiterated the principle that the benefit of the doubt must go to the accused and stated that the victim was not a juvenile.

However, this principle is not uniformly applied. Oftentimes, the margin of error of two years on either side is not accounted for. Judicial opinions have also stated that there is no such rule to add two years, let alone an absolute rule.⁶⁴ Further, courts have not uniformly extended the benefit of the doubt to the accused. Many High Courts have blamed the prosecution for not having adduced documentary proof of age and have denied benefit of medical opinions to the accused. In *Khalil Mehboob Shaikh v. State of Maharashtra*,⁶⁵ the Bombay High Court was faced with only an ossification test that stated that the victim was between 15-16 years. Applying the margin of error principle of two years on either side, the upper age limit of the victim would have been 18 years. The High Court accepted the age of the victim to be 16 years and held that the onus is on courts to see that justice is done to the victim as well.

Another issue with respect to medical examination was highlighted in *Mukkarab v. State of U.P.*⁶⁶ in which a plea for juvenility of the offender was raised for the first time before the Supreme Court. A medical opinion was sought which stated that on the day of examination, 22 years after the incident,

⁶¹ (2008) 13 SCC 133.

⁶² (2015) 7 SCC 773.

⁶³ SCC OnLine Del 10448, Criminal Revision Petition 195 of 2018 decided on 08.08.2018.

⁶⁴ *State of U.P v Chhoteylal* (2011) 2 SCC 550; *State of Karnataka v Bantara Sudhakara @ Sudha & Anr* (2008) 11 SCC 38.

⁶⁵ 2019 SCC OnLine Bom 242, Criminal Appeal 315 of 2014 decided on 30.01.2019.

⁶⁶ (2017) 2 SCC 210.

the Appellant was 35-40 years old. Following *Babloo Pasi*⁶⁷ and *Anoop Singh's*⁶⁸ cases, the Court held that ossification tests cannot be regarded as conclusive when it comes to ascertaining the age of a person, especially when the person is above the age of 30 years as the accuracy of the bone ossification test reduces with age of the person examined. Courts have also considered other medical tests to determine age like presence of secondary sexual characteristics⁶⁹ and dental examination.⁷⁰

What transpires is that medical opinion is sought as a last resort in age determination proceedings. There is no engagement by courts with the science of the medical evidence and there is no clarity on the accuracy of the procedure employed. Further, the different kinds of tests and the reduced reliability of tests have added even more uncertainty. This continuing ambiguity and lack of guidance on when and how much margin of error should be accounted for has resulted in a state where it can be said that the medical opinion may not be an accurate indication of age. This is a troubling fact considering the ramifications on the rights of an accused when the prosecution is establishing the age of the victim.

IV. NEED FOR DIFFERENTIAL STANDARDS IN AGE DETERMINATION PROCEEDINGS

The analyses in the previous sections reveal that questions on evidentiary standards in age determination proceedings have received little attention by courts. This section discusses the rationale for a differential standard of proof between proceedings adjudicating juvenility claims of the offender and the demands on the prosecution for establishing the age of the victim as an ingredient of the offence. We argue that when age-based considerations attract harsher punishments they become an ingredient of the offence and the prosecution must meet a higher standard for enhanced deprivation of liberty.

A. Juvenility Claims of Offenders

As discussed in Part II, a claim of juvenility by an offender before any judge, irrespective of whether it is a POCSO offence or not, will have to be ultimately adjudicated according to the procedure in Section 94 of the 2015 Juvenile Justice Act. Depending on whether it is a POCSO offence or not, the route to reaching Section 94 of the 2015 Juvenile Justice Act will be different but the process of adjudicating a juvenility claim of the accused will be the same. In cases not involving the POCSO Act, it is a straightforward application

⁶⁷ (n 61).

⁶⁸ (n 62).

⁶⁹ *Vijay v State of MP* (2010) 8 SCC 191.

⁷⁰ *Kailash v State of Madhya Pradesh* (2013) 14 SCC 340.

of the 2015 Juvenile Justice Act as claims of juvenility can be raised before any court under Section 9(2) of the 2015 Act and the proviso to the section states that the claim will be decided according to the provisions in the Act which would lead a court to Section 94.

However, for offences under the POCSO Act, since the legislation has a separate provision (Section 34) on determination, further clarification is required on reasons for invoking Section 94 of the 2015 Juvenile Justice Act. Section 34 of the POCSO Act requires the court “*to satisfy itself about the age of such person and record reasons for such determination*”. There is no further guidance in the POCSO Act on the manner in which judges must go about this exercise. Given that the POCSO Act was enacted in June 2012 and that the Juvenile Justice Act in December 2015, the appropriate statutory construction would be that the legislature was aware of the POCSO Act when enacting the 2015 Juvenile Justice Act and as a principle of interpretation, the relevant provisions of the 2015 Juvenile Justice Act in this regard must come to bear on Section 34 of the POCSO Act.⁷¹ Since Section 9(2) does not contemplate any exception for POCSO courts and makes that provision applicable to ‘any court’, the claim of juvenility even in a POCSO offence must be adjudicated according to the provisions of Section 9(2) read with Section 94 of the 2015 Juvenile Justice Act. Even in judgments involving the question of juvenility of the accused in POCSO offences, courts have routinely gone to Section 94 of the 2015 Juvenile Justice Act to exercise their mandate under Section 34 of the POCSO Act.⁷²

There is also a minor matter of whether Section 34 of the POCSO Act can be used by courts to determine the age of victims. This confusion arises because the marginal note of the provision indicates that it is a provision that applies only to offenders and states “*Procedure in case of commission of offence by child and determination of age by special court*”. However, Section 34(2) is widely worded to cover the inquiry into whether ‘a person is a child or not.’⁷³

B. Age of Victims

As discussed in Part III, judicial decisions have adopted different approaches to determining age of victims. The variations are broadly along two parameters. One issue has been the documents that courts can use to

⁷¹ *The Lord Krishna Sugar Mills Ltd. and Anr. v Union of India and Anr.* (1960) 1 SCR 39.

⁷² *The Addl. Sessions Judge, Hingoli v Bhagwat S/o Parbati Kshirsagar and ors.* 2018 SCC OnLine Bom 53; *Manoj Vishwkarma v State of Chhattisgarh* Criminal Revision 138 of 2017 (High Court of Chhattisgarh); *Siddu v The State* 2016 SCC OnLine Kar 8347; *Rahul Jangde v State of Chhattisgarh* 2021 SCC OnLine Chh 439; *Mohd. Yunus v State of UP* 2018 SCC OnLine All 1189; *Gopi v State of Karnataka* Criminal Revision Petition No. 1162/ 2015; *Banangsan Tynsong v State of Meghalaya* 2015 SCC OnLine Megh 51.

⁷³ See, (n 46).

determine the age of the victim and the second has been about the necessity to establish the underlying basis of the documents as per the requirements of the Indian Evidence Act. On the question of the documents that can be used, courts have either limited themselves to the documents mentioned in Section 94 of the 2015 Juvenile Justice Act or have taken the position that the documents that can be considered are not limited by Section 94. The second issue that intersects with the first is whether the underlying basis of the documents, irrespective of whether they are Section 94 documents or not, needs to be established as per the requirements of the Indian Evidence Act. There have been judgments which have taken the position that the underlying basis needs to be established both in the context of Section 94 documents and also documents beyond Section 94.

From these positions on the two issues, four positions can be contemplated for determining the age of the victim:

- I. **Only** Section 94 documents can be used along with an enquiry into the underlying basis.⁷⁴
- II. **Only** Section 94 documents can be used and no enquiry can be undertaken for establishing the underlying basis (just like for a child in conflict with law).⁷⁵
- III. Documents beyond Section 94 can be used and no enquiry can be undertaken for establishing the underlying basis.
- IV. Documents beyond Section 94 can be used along with an enquiry into the underlying basis.⁷⁶

To resolve this uncertainty, it is our view that point (IV) above is the most appropriate legal position considering the statutory language and underlying criminal law principles.⁷⁷ Unlike for children in conflict with law, while looking into the age of a victim under Section 34 of the POCSO Act, the judge is not required to go to Section 9(2) of the 2015 Juvenile Justice Act and therefore is not bound by Section 94 (because Section 9(2) applies only to alleged offenders). Therefore, a judge under Section 34 of the POCSO Act is free to move beyond the confines of Section 94 of the 2015 Juvenile Justice Act and can rely on documents other than those mentioned in Section 94 to determine

⁷⁴ Pradeep Kumar (n 57); Guruprasad (n 58); Imran Gani Mujavar (n 58); Ashok Dashrath Kaklij (n 58).

⁷⁵ Debabrata Sahoo (n 55); Prayagraj Nayak (n 56); *Sri Ganesh v State of Tamil Nadu* (2017) 3 SCC 280.

⁷⁶ *Md. Masuk Ali v State of Tripura* CrI. A. (J.) 51 of 2016 (High Court of Tripura); *Sunil Kumar v State of Haryana* 2007 SCC OnLine P&H 1144.

⁷⁷ The authors acknowledge that a number of practical considerations also weigh in while proving age. These have been highlighted in the CCL study (n 44) (81) and the HAQCRC study (n 13) (12). The purpose of this paper is restricted to provide a doctrinal solution to the issue.

the age of the victim. Therefore, Section 34 of the POCSO Act has to be read differently depending on whether we are considering age determination of offenders or victims. In a POCSO case where the age of the offender is to be determined, a judge exercising powers under Section 34 of the POCSO Act will be bound by Sections 9(2) and 94 of the 2015 Juvenile Justice Act. However, when the age of the victim is to be determined, the judge has much wider powers under Section 34 in terms of the documents that can be considered. It flows from the above that even in non-POCSO cases where the age of the victim is in question, the judge can look at documents beyond Section 94 to determine the age of the victim. While judges can consider a broader range of documents to establish the age of the victim, it must be accompanied by the requirement to establish the underlying basis of that document as per the requirements of the Indian Evidence Act. This requirement would be essential where age of the victim is an ingredient of the offence.

Age of the victim becomes an ingredient of the offence when age is used to create a new substantive offence and make an offender liable to enhanced punishment. Age then needs to be established with the same standard of proof (beyond reasonable doubt) as other elements of the offence. This is even more significant in the context of the POCSO Act because of the clauses that bring in the reverse burden of proof and presumption of *mens rea*. Age of the victim then becomes the threshold issue for triggering the POCSO Act and the special criminal law principles contained therein. Given the consequences for the accused being tried under the POCSO Act in terms of the reverse burden, *mens rea* and heightened punishment, the threshold trigger must be established under the 'beyond reasonable doubt' standard. The reverse burden and the assumption of *mens rea* exist in the POCSO Act to account for the particular vulnerabilities that children face in the context of sexual violence prosecutions and also to mitigate the particularly difficult obstacles that exist in prosecuting such crimes. While a strong and justified case has been made out for such deviations from criminal law principles in other contexts, the threshold fact for such deviations must exist on very sure footing. And it is for these reasons we have argued that while judges can look at a broad range of documents to establish age of the victim in POCSO cases (or other offences where age is an ingredient of the offence), an enquiry to look into the basis of those documents according to the requirements of the Indian Evidence Act must be allowed.

V. CONCLUSION

This paper began by analysing the statutory ambiguity and consequential confusion in age determination proceedings for victims when compared with children in conflict with law. It was seen that courts have adopted different measures to overcome this legal uncertainty on issues concerning the documents/ methods that can be used and the standard of proof. In certain cases involving age determination of the victim, provisions of the juvenile justice

legislations in force were used without a proper evidentiary scrutiny whereas in others, a detailed scrutiny of the credibility of information recorded in documents was followed. Another set of cases were noticed where courts, while determining the age of the victim, went beyond documents stated in juvenile justice legislations and examined the underlying basis of the documents presented. We have argued that these different positions have arisen due to a conceptual misunderstanding as to the nature and ambit of age determination inquiries in the context of a victim and an offender. Both contexts are qualitatively different. Where age of a victim is an essential element of the offence, age needs to be proved by the prosecution beyond a reasonable doubt. We have argued that the age determination process in the juvenile justice legislations must be limited to children in conflict with law due to the fact it is a beneficial legislation to protect the interests of juvenile offenders. The law must evolve in a direction where courts can consider a wider range of documents for determining the age of victims but must be held to a very high standard of proof in establishing the underlying basis of those documents, especially when age is an ingredient of the offence. The prosecution cannot take benefit of the lower standard of proof in juvenile justice legislations when seeking to impose higher punishments for offences based on the age of the victim.