

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

% Judgment Reserved on: 21.08.2009
Judgment delivered on: 22.09.2009

**Crl. Appeal No. 160/2006 &
Crl. M. (Bail) 558/2009**

TEJA @ TEJVEER SINGH @ TEJ PAL Appellant

Vs

N.C.T. GOVT. OF DELHI (STATE) Respondent

Advocates who appeared in this case:

For the Appellants : Mr Naresh Kumar, Advocate
For the Respondent : Mr Amit Sharma, Addl. Public Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. This is an appeal preferred by the appellant against the judgment and sentence dated 21.12.2005 rendered by the Additional Session Judge (ASJ), Karkardooma, Delhi. The learned ASJ, by virtue of the impugned judgment, has sentenced the appellant to a rigorous imprisonment for a period of 10 years for each of the offences under Section 363/366 and 376 of the Indian Penal Code, 1860 (in short the 'IPC'). In addition, a fine of Rs 5,000/- has been imposed in respect of each of said offences. In default, the appellant/accused would be required to undergo simple imprisonment for a further period of one year for each of the offences. The sentences are to run concurrently.

2. The appellant/accused who is convicted for an offence of kidnapping and rape has primarily pivoted his defence on the ground of consent of the prosecutrix (PW1), who he claims, willingly accompanied him in fleeing from her home, and subsequently got married to him. However, this by itself would not end the travails of the appellant/accused because even if the prosecution fails to establish that there was a lack of consent, it could still succeed in getting the appellant/accused convicted at least under Section 376 of the IPC, if it is able to prove that on the date of the incident, i.e., 16.01.2002 the age of the prosecutrix (PW1) was less than 16 years, as it would then, constitute a rape within the provisions of the 6th circumstance provided for under the provisions of Section 375 of the IPC. Unfortunately, the trial court has confined its examination of the case only to this aspect and, therefore, returned a finding only as regards the issue as to whether the prosecutrix (PW1) on the date of incident was below the age of 16. This, according to me, is an approach which should be abjured by the trial courts. The trial court ought to have determined both the issues. Given the fact that nearly 7 years have passed from the date of the incident, and the appellant has already undergone nearly half of the sentence, awarded to him, it would be inappropriate for this court not to examine all the contentions of the appellant/accused based on the evidence, available on record.

3. It is in this background that one is called upon to examine the case of the prosecution. The prosecution has examined Sixteen (16) witnesses, out of which three (3) are the relatives of the prosecutrix (PW1) being; the father Mool Chand (PW3), mother Kaushalya (PW7), and cousin brother Rajesh (PW2). The land lord of the

house, where the prosecutrix (PW1) and the appellant/accused stayed for nearly one month, Mahesh (PW5), has also been examined. Dr. Usha Upreti, who examined the prosecutrix (PW1) on 27.02.2002 is PW9, while Dr. S.B. Jangpangi, who examined the appellant/accused, is PW10. The remaining witnesses, apart from the prosecutrix (PW1), are police witnesses, who were involved with various facets of the investigation. The edifice of the prosecution's case, therefore, rests mainly on the testimony of the prosecutrix (PW1) herself, the members of her family, the land lord and the doctors, who examined her and the appellant/accused.

4. The prosecution version is as follows: On 19.01.2002, ASI Chanchal Sharma (PW4) was on duty at police station Mandawali, Delhi. At about 1.50 p.m., he received a complaint from the father (PW3) of the prosecutrix (PW1), which inter alia, brought to fore the fact that the prosecutrix (PW1), had attended her school on 16.01.2002 for her pre-board examination along with her younger sister Monika. Since the prosecutrix (PW1) did not return from her school, the complainant/father (PW3) tried to look for her at all known places, including the house of his relatives and friends. The complainant/father (PW3) also made enquiries with the owner of the van, which each day took the prosecutrix (PW1) along with other children to the school and brought them back. Through his enquires with the van owner that PW3, the father of the prosecutrix, learnt that the appellant/accused had been removed from employment. It is in these circumstances, that the complainant/father (PW3) informed the police that he suspected the appellant/accused of having kidnapped the prosecutrix (PW1).

Based on his complaint, a FIR bearing no. 19/2002 under Section 363 of the IPC was registered on 19.01.2002.

4.1 The ASI Chanchal Sharma (PW4) proved the registration of FIR being Ex. PW3/A. He also deposed that the FIR was handed over to SI D.K. Tejwan (PW15) through constable Pawan Kumar (PW8).

4.2 SI Pawan Kumar (PW8), in his testimony, deposed that on receipt of the FIR he handed over the same to SI D.K. Tejwan (PW15). He further deposed that they visited the village of the appellant/accused in Ghazipur, U.P. where they met his sister Saroj as well as his brother. In their visit to Ghazipur, they were accompanied by PW3, the father of the prosecutrix (PW1). It is here that they were handed over a passport size photograph of the appellant/accused, which SI D.K. Tejwan (PW15) took in his possession and drew up a memo (Ex. PW8/A). In his examination-in-chief, even though he deposed that it was the prosecutrix (PW1) who had handed over the birth certificate issued by St. Andrews Scots Senior Secondary School, where she was studying at the time when the incident took place; in his cross-examination, however, he slipped into amnesia and, stated that he did not remember having made any statement with regard to having taken into possession the age certificate of the prosecutrix (PW1). PW8, however, stated that the I.O. seized the birth certificate and drew up a memo being Ex. PW 8/B.

4.3 S.I. D.K. Tejwan, I.O. (PW15) confirmed the events of 19.01.2002, that is, receipt of information from the father (PW3) about his daughter having been kidnapped by the

appellant/accused. He testified that on receipt of information, notices were published with respect to, the prosecutrix (PW1) and the appellant/accused which he proved as Ex. PW15/A and Ex. PW15/B respectively. He also testified that wireless messages were flashed with regard to the kidnapping of the prosecutrix (PW1). He testified having collected the age certificate of the prosecutrix (PW1) from the complainant/father (PW3). He deposed that on 26.02.2002, secret information was received that the appellant/accused was residing with the prosecutrix (PW1) at DD-221, Krishna Colony, Palwal, Haryana. Thereafter, on receipt of information, he testified, a raiding party comprising of himself, cousin brother of the prosecutrix, Rajesh (PW2) and constable Somdutt (PW14) reached Palwal (Haryana) along with the informer, at about 11.00 p.m. At 6.00 a.m. in the morning, the next day they entered the house situated at DD-221, Krishna Colony, Palwal, Haryana, where both the prosecutrix (PW1) and the appellant/accused were found present. The prosecutrix (PW1) was identified by her cousin brother Rajesh (PW2). A recovery memo (Ex. PW2/A) was prepared. He proved his signatures at point 'A' on the recovery memo. He also testified that a site plan (Ex. PW15/D) of the place of recovery was also prepared. He testified with regard to his signatures at point 'A' on the site plan. He also deposed with respect to the fact that a statement of the owner of the house, Mahesh (PW5) was also recorded by him. He also testified with regard to the medical examination of both the prosecutrix (PW1) and that of the appellant/accused. He further deposed with respect to having received two sealed packets (pulandas) and one sample containing the vaginal swab. He deposed having received the blood

sample of the appellant/accused. He further testified that the sealed packet (pulanda) (Ex. PW12/A) containing underwear and blood sample of the appellant/accused, and the other packet (pulanda) (Ex. PW11/A) containing undergarments and vaginal swab of the prosecutrix (PW1) were sent to the Forensic Science Laboratory (FSL), Malviya Nagar, Delhi, through Constable Kheta Ram (PW13) for examination. He testified with regard to the fact that the said reports are exhibited as Ex. PW/E1 to Ex. PW/E3 as also the fact that the Ossification report of the prosecutrix (PW1) is Ex PW15/F. In his cross-examination, he testified that prosecutrix (PW1) and the appellant/ accused were lying on a cot when they were apprehended and the prosecutrix (PW1) was wearing salwar and shirt, while the appellant/accused was wearing pant and shirt at that point in time. He accepted the fact that at the time when the prosecutrix (PW1) and the appellant/accused were apprehended they did not attempt to run away. He had no recollection, however, as to whether the prosecutrix (PW1), at the time when she was apprehended, had applied *sindhoor* on her forehead. He denied the suggestion that the prosecutrix (PW1) had told him, at the time when she was apprehended along with the appellant/accused, that the appellant/accused was her husband, and that she wanted to live with him and not go back to her parents. In his cross-examination he seems to have contradicted himself as to whether the appellant/ accused, at the time when he was apprehended, was carrying a mobile phone. At one point he said that the appellant/accused had a mobile phone with him, and immediately thereafter, he denied this fact.

4.4 As indicated by me, the testimony of the prosecutrix (PW1) is crucial for the purposes of this case. In her testimony, the prosecutrix (PW1) has stated that she had been travelling in the van, driven by the appellant/accused, for about two months prior to the date of incident. She has also testified that the appellant/accused had, on one such trip, handed over a letter to her, in which he had expressed his love and affection for her, which was not reciprocated by the prosecutrix (PW1). On 16.01.2002, the prosecutrix (PW1) travelled by the van to appear for her pre-board examination. In the afternoon she got into the same van. The van was empty, according to the prosecutrix (PW1), as younger children were on vacation, due to pre-board examination being held for students of classes Xth and XIIth. The prosecutrix (PW1) testified that the appellant/accused instead of taking the van home, took the van to some other place. On the way she, however, screamed. Since the appellant/accused threatened to harm her and her family members, she remained quiet. The van, according to her, took her to a place outside Delhi, wherefrom she did not attempt to telephone her parents, since the appellant/accused issued threats both vis-à-vis her and her family members. The prosecutrix (PW1) deposed that she started living with the appellant/accused, and it is then that he subjected her to sexual intercourse repeatedly over the period of one month, that she lived with him, in a tenanted accommodation, outside Delhi. She testified that her date of birth was 18.07.1986. In her cross examination, she deposed that she knew the appellant/accused for nearly two months prior to the incident. The appellant/accused used to telephone her at her residence; however, she was not aware of the mobile number of the

appellant/accused. She also testified that even though threats were meted out to her while they were travelling in the van, the appellant/accused did not, at any point in time, leave his seat. The prosecutrix (PW1) testified that at the various traffic signals, where the van stopped, she did raise an alarm but persons passing by could not hear her, since the windows of the van were rolled up.

4.5 What is important is that in her testimony, she accepts the fact that even though she got acquainted with the ladies of the tenanted house, where they were living, however, at no point in time did she disclose to them that she had been kidnapped or subjected to sexual intercourse by the appellant/accused against her will. In the prosecutrix's (PW1) testimony, it has clearly come out that she informed the other ladies of the house where she was residing with the appellant/accused, that she was the wife of the appellant/accused. The prosecutrix (PW1) also testified to the effect that the appellant/accused did step out of the house for a period of 1 to 3 hours daily, at which point in time she was alone, and even so, she made no attempt to escape from the house where they were living. She also deposed that it was the appellant/accused who would cook and wash clothes for both of them, while they were living in the house. She denied the suggestion that the appellant/accused had sexually assaulted her prior to 16.01.2002, i.e., the date of the incident. The prosecutrix (PW1) denied the factum of her marriage with the appellant/accused. In her testimony, the prosecutrix (PW1) accepted that she did not resist the sexual assault of the appellant/accused though she had tried to push the appellant/accused away. She stated that since the appellant/accused would shut her mouth, it prevented her from

raising an alarm, while being subjected to sexual intercourse. She deposed that the appellant/accused was in love with her. However, the feeling was not reciprocated by her.

4.6 The cousin brother Rajesh (PW2) testified with respect to the fact that he had gone along with the police to the appellant's/accused village at Ghazipur, U.P., where they were handed over a photograph of the appellant/accused by his family members. He also testified to the effect that he had accompanied S.I. D.K. Tejuwan (PW15) on 26.02.2002 on their raid at the house in Palwal (Haryana), from where the prosecutrix (PW1) and the appellant/accused were apprehended. In his cross examination, he denied the suggestion that the prosecutrix (PW1) was a major, and that she was married to the appellant/accused.

4.7 The complainant/father (PW3) of the prosecutrix (PW1) in his testimony detailed the events of 16.01.2002. He deposed with respect to lodgement of the complaint by him with the police station, Mandawali, Delhi, on 19.01.2002. He proved his signatures on the FIR (Ex. PW3/A) at point 'A'. He deposed with respect to the medical examination of the prosecutrix (PW1) at Lal Bahadur Shastri Hospital (in short the 'Hospital') on 27.02.2002. In his cross-examination, PW3 testified that at the time of his daughter's admission at St. Andrews Scots Senior Secondary School, he had submitted a school leaving certificate issued by the school in which she was earlier admitted, which is, Sarvodaya Laghu Mahyamik Vidyalaya at Ghazipur, U.P. He testified that the prosecutrix (PW1) was admitted to St. Andrews Scots Senior Secondary School in 1997, and that his younger daughter Monika was admitted to the

same school in 1999. He denied the suggestion that the prosecutrix (PW1) had informed him about being teased by the appellant/accused at any time prior to 16.01.2002. He denied the suggestion that the prosecutrix (PW1) was 22 years old. He denied the knowledge of the fact that the prosecutrix (PW1) received telephone calls from the appellant/accused at their residence.

4.8 The landlord, Mahesh (PW5), identified the appellant/accused as the one who had stayed at his house. He testified that on 16.01.2002 the appellant/accused came to his house looking for a room on rent along with the prosecutrix (PW1), who he claimed to be his wife. He deposed that he had let out the house on a monthly rent of Rs 400. He deposed that while the appellant/accused was away from his house, the prosecutrix (PW1) had often accompanied his wife and other ladies to the market. In his cross-examination, he testified that the prosecutrix (PW1) used to apply *sindhoor*, and also wore *chutaki* in the fingers of her feet, and also, a *mangalsutra*, and that she dressed like a married woman. He further testified that the prosecutrix (PW1) had attended a 'jasotan' ceremony held at his house. It was also brought out in his cross-examination that he had a telephone installed in his house to which the prosecutrix (PW1) had access. He further testified that he had seen both the appellant/accused and the prosecutrix (PW1) in a compromising position. He testified that the prosecutrix (PW1) never made any complaint against the appellant/accused to him or any other members of the family.

4.9 Ms P.L. Rana (PW6), Principal of St. Andrews Scots Senior Secondary School testified that the prosecutrix (PW1) was admitted

to their school on 30.07.1997, and as per their record her date of birth was 10.07.1986. She testified that the certificate (Ex PW6/A) was issued by her, on 19.01.2002. She proved the application form (Ex. PW6/B) for registration of admission of the prosecutrix (PW1) which was filed by her parents, on 23.07.1997. She also proved the certificate issued by the school in which the prosecutrix (PW1) was admitted (Ex. PW6/C). She testified that as per the original register of all the students, maintained by the school, the prosecutrix's (PW1) name appeared at serial no. 1687, and that as per the said register her date of birth was 10.07.1986. In her cross-examination, she accepted the fact that there was over-writing in Hindi of the word '*swecha*' and, also with respect to, the date of birth which has been evidently changed from 10.07.1985 to 10.07.1986. She also testified that there was over-writing of the word '*naukri*' after the name, Mool Chand.

4.10 Sh. Ram Karan Singh Yadav (PW16), who at the relevant time, was the Asst. Head Master of Sarvodya Laghu Mahyamik Vidyalaya, Gazipur, U.P., deposed that as per their record, the date of birth of the prosecutrix (PW1) was 10.07.1986. He testified that the prosecutrix was admitted to their school on 18.07.1996, in Grade VI and, continued in the school till 11.07.1997. He proved the transfer certificate being Ex. PW6/C, which bore the signatures of the Principal at point 'A'. In his cross-examination, it was observed by the Court, that except the entry pertaining to the prosecutrix (PW1), the Principal had not signed any of the entries in the register.

4.11 The appellant/accused in his statement under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.') clearly stated that at the relevant point in time on 16.01.2002, he was not in the service of the school. He made a categorical statement that he had left the job of the school one month prior to the date of the incident, and that it was the prosecutrix (PW1), who had called him to school; and after initial reluctance, on the prosecutrix's (PW1) insistence, he agreed to visit her at the school. He categorically stated that the prosecutrix (PW1) had informed him that she was 19 years of age, and that the prosecutrix (PW1) had willingly accompanied him to Palwal (Haryana) as she was in love with him; a relationship which was objected to by her family members. He also stated that they had got married and were staying at Palwal (Haryana) as husband and wife for a period of one month before they were apprehended by the police. The appellant/accused's defence was one of false implication.

4.11 Dr. Usha Upreti (PW9), who examined the prosecutrix (PW1), proved the MLC (Ex.PW9/A). She confirmed the opinion rendered by her in the MLC. In her deposition she clearly testified as follows:-

"No injury marks over thigh or vulva, bilateral labia majora and minora normally developed, hymen - torn, old tear + no fresh injury mark, carunculæ myritiformis.

P/S - Cervix healthy; vagina healthy. P/V vagina patulous, admitting two fingers easily, uterus deviated to left side, normal size, mobile, R/V bilateral fornices free, non tender."

4.12 In her cross-examination, PW9 testified that when the vagina admits two fingers, it can be concluded that the person concerned is sexually active.

4.13 Dr. S.B. Jangpangi (PW10) proved the MLC (PW10/A) with regard to clinical examination of the appellant/accused. He testified that the appellant/accused was capable of performing sexual activity. He also testified that the under garments of the appellant/accused as well as his blood samples were sealed and handed over to the I.O. (PW15).

Submissions of Counsel

5. The learned counsel for the appellant/accused submitted that the reading of the testimony of the prosecutrix (PW1), complainant/father (PW3), mother Kaushalya (PW7), cousin brother Rajesh (PW2) and more importantly, the land lord Mahesh (PW5) would show that the prosecutrix (PW1) went away with the appellant/accused of her own will; the prosecutrix (PW1) was living with the appellant/accused as his wife in Palwal (Haryana); and that therefore, it could not be said that the prosecutrix (PW1) was subjected to sexual intercourse against her will.

5.1 As regards the age of the prosecutrix (PW1), the learned counsel for the appellant submitted that the Ossification report clearly shows [which has been proved by the I.O. (PW15) and marked as 'X'] that the prosecutrix (PW1) was between 18 to 22 years of age at the time of the incident. He also referred to the application form (Ex. PW6/B) for registration of admission as well as the certificate (Ex. PW6/C), issued by the Sarvodya Laghu Mahayamik Vidyalaya, Ghazipur, U.P., to demonstrate that there was over-writing in the first one with respect to the date of birth, in

particular, the year which has been changed from 1985 to 1986, and in the second certificate (Ex. PW6/C), there was over-writing with respect to the column where details of the father had to be given in so far as the words '*naukri*' was concerned, as also the date of birth, which was once again quite evidently over-written and changed from 1985 to 1986. He submitted that the admission and withdrawal register, on which reliance has been placed by the prosecution, in which the date of birth of the prosecutrix (PW1) was given as 10.07.1986 being Ex. PW6/D, would have no relevance since the entry was on the face of it made on 04.04.2002, much after the date of the incident, as well as, the filing of the FIR. He also took me through the testimony of the mother Kaushalya (PW7) to show that her deposition with regard to the age of the prosecutrix (PW1) cannot be relied upon. In brief, his submission was that in view of the fact that there is overwhelming evidence of the fact that the prosecutrix (PW1) went away with the appellant/accused of her own volition, and lived with him as his wife, the offences of kidnapping and rape were not made out. He further submitted that in view of the fact that the Ossification report indicated that the age of the prosecutrix (PW1) was 18 to 22 years on the date of the incident, and given the fact that there was tampering with the record of the case, and the inherent unreliability of the evidence of the other witnesses being interested witnesses, it could not be held that the case of the appellant/accused came within the ambit of the definition of the 'rape' as provided under the 6th circumstance of Section 375 of the IPC.

6. As against this, Mr Amit Sharma, the learned APP, laboriously took me through the evidence of prosecutrix (PW1) to show lack of consent on her part. He submitted that there was apprehension of danger to her life which inhibited her from disclosing the fact that she was being subjected to sexual intercourse against her will. As regards the age, the learned APP submitted that the birth certificate was a vital piece of evidence which the courts have accepted for determination of the age of a rape victim. He relied upon the judgment of the Supreme Court in the case of ***State of Maharashtra vs Gajanan Hemant Janardhan Wankhede (2008) 8 SCC 38.***

Reasons

7. I have heard the learned counsel for the appellant as well as the learned APP for the State. I am of the view that the benefit of doubt will have to be given to the appellant/accused for the following reasons: The testimony of prosecutrix (PW1) as well as that of the land lord, Mukesh (PW5), clearly raises the following issues and hence a doubt with regard to the prosecution version:

(i) How is that the prosecutrix (PW1) travelled from Delhi to Palwal (Haryana), which is a journey of nearly two hours, in broad day light, and it did not attract anyone's attention despite the fact that prosecutrix (PW1) testified that she had raised an alarm. It is not conceivable that the prosecutrix (PW1) could have been controlled by the appellant/accused while he was driving the van in which they were travelling. It is also inconceivable and therefore, difficult to accept that she could not attract any passerby's attention even though the van stopped at various traffic signals as per her own testimony.

(ii) How is it that despite the fact that the prosecutrix (PW1) was left alone for long hours by the appellant/accused while he went away for work or, to attend to his personal chores, the prosecutrix (PW1) did not use the circumstance to her advantage. This fact raises doubts as regards the prosecution's case that she was unable to physically free herself from the clutches of appellant/accused. It is not the prosecution's case that while the appellant/accused was away, the prosecutrix was tied, locked or gagged.

(iii) The acceptance by the prosecutrix (PW1) in her testimony that she informed the ladies of the house, in which she was staying in Palwal (Haryana), that she was the wife of the appellant/accused; a fact which is also substantiated by the testimony of the land lord Mahesh (PW5). The argument put forth by the prosecution that the prosecutrix (PW1) could not divulge the truth to the other occupants of the house or any person in locality because the appellant/accused had threatened her and her family members, is difficult to believe, given the time span over which the appellant/accused and the prosecutrix (PW1) lived in the house of PW 5.

(iv) The testimony of the land lord, Mahesh (PW5), clearly brings out the actual scenario, which was, that the appellant/accused and the prosecutrix (PW1) were living in the house as husband and wife. As a matter of fact, PW5 testified that in her appearance, the prosecutrix (PW1) always brought to bear on her persona accompaniments which are associated with a married woman. In this regard, he made reference to the fact that she applied *sindhoor* and wore *chutaki* on her toes which are attributed to a married lady.

(v) The prosecutrix (PW1), on her own showing, as per the testimony of the land lord Mahesh (PW5) clearly had several opportunities to escape the clutches of the appellant/accused or at least divulge her ordeal, if any, to the landlord (PW5) or, to the other ladies of the house at Palwal (Haryana). The fact that she freely visited the nearby market with the other ladies of the house at Palwal (Haryana), where they were residing, only fortifies the suspicion that the prosecutrix (PW1) was not confined to the house against her will.

8. Based on the evidence on record, I am not persuaded to accept the case, set up by the prosecution, that the prosecutrix (PW1) was subjected to sexual intercourse against her consent.

9. This brings me to the other aspect of the matter, as to whether the prosecutrix (PW1) on the date of the incident was less than 16 years of age. The prosecutrix (PW1) in her testimony has deposed that her date of birth is 18.07.1986. The record of both St. Andrews Scots Senior Secondary School (Ex. PW6/B) as well as Sarvodya Laghu Mahyamik Vidyalya (Ex. PW6/C) seems to indicate that the prosecutrix's (PW1) date of birth is 10.07.1986. The Ossification report, mark 'X', shows the age of the prosecutrix (PW1) between 18 to 22 years. Both the father (PW3) and the mother (PW7) have denied the suggestion that the prosecutrix (PW1) was a major on the date of the incident. Ordinarily, the courts accept the date of birth certificate, issued from a corporation, hospital or even one issued by the school. This is based on the rationale that there would be no reason to incorporate an incorrect date of birth on such like documents, as it could not have been anticipated at the time when such information is entered

in the records of such authorities that the prosecutrix (PW1) would get involved in an incident such as a rape. However, this statutory rule of prudence is given a go-by when, in a given case, a doubt is cast with regard to the quality of evidence produced in that regard. In the instant case, the doubts are cast for the following reasons:

(i) Constable Pawan Kumar (PW8), in his examination-in-chief, says that the prosecutrix (PW1) had handed over the birth certificate issued by the principal of St. Andrews Scots Senior Secondary School. In his cross-examination, he further stated that he did not remember if he had made a statement regarding taking possession of the birth certificate from the prosecutrix (PW1).

(ii) On the other hand, the I.O. (PW15), in his testimony, has stated that the birth certificate of the prosecutrix (PW1) was collected by him from the complainant/father (PW3).

(iii) Ms P.L. Rana (PW6), principal of St. Andrews Scots Senior Secondary School clearly stated in her testimony that the entry as regards the date of birth of the child at the stage of admission is made as per the information given by the parent. In her cross-examination, she produced both the application form (Ex. PW6/B) filled up by the parents, as also the certificate issued by school where the prosecutrix (PW1) was studying prior to her admission to St. Andrews Scots Senior Secondary School (Ex. PW6/C). There is undoubtedly an over-writing with regard to the word '*naukri*', '*swecha*', as well as the year of birth, which has been changed from 1985 to 1986.

(iv) Similarly, Sh. Ram Karan Singh Yadav (PW16), Asst. Head Master of Sarvodya Laghu Mahyamik Vidyalaya, Gajipur, U.P. clearly accepted in his cross-examination that the original certificate did

not bear the signatures of the principal. Furthermore, the court had observed that the original register which contained the records of the students did not bear the signatures of the principal.

(v) Furthermore, the testimony of the mother (PW7) would indicate that while she claims to be an illiterate in court; however her qualification recorded in Ex. PW6/B, which is the application form for registration of the admission of the prosecutrix (PW1) in St. Andrews Scots Senior Secondary School disclose her qualification as High School. PW7 has also clearly contradicted herself in so far as the age of the prosecutrix (PW1) is concerned. Before the court PW7 has given her age as 45 years. The testimony of PW7 was recorded in court on 04.07.2003. She has claimed that they had been residing in Delhi for about 8 to 9 years, which would fix the year as 1994 or 1995. She has stated that she admitted the prosecutrix (PW1) to Grade VI. In 1993-94, if the date of birth of the prosecutrix (PW1) is taken as 10.07.1986, her age would be around 7 or 8 years. It does seem unlikely that the prosecutrix (PW1) could have gained admission to Grade VI when she was 7 or 8 years old. Furthermore, in her cross-examination PW7 said that when she gave birth to the prosecutrix (PW1), she was about 19 to 20 years of age. In 2002, if the PW7's claim is accepted, that the prosecutrix was 16 years then, by this calculation in 2003, PW7 should have been around 37 years of age, and not 45 years, as she had stated on oath before the court.

(vi) The reliance by the learned APP on the judgment of ***Gajanan Hemant Janardhan*** (*supra*) is of no help for the reason that, in that case, the Supreme Court came to the conclusion that the High Court should not have ignored the evidence which emerged with

regard to the date of birth of the prosecutrix from the school leaving certificate and the school register. In the instant case, it has clearly come out in the cross-examination that there is over-writing in both exhibits, Ex. PW6/B, which is the application form for registration/admission of the prosecutrix in St. Andrews Scots Senior Secondary School, and Ex. PW6/C, which is a document produced by Sarvodya Laghu Mahyamik Vidyalya, in respect of date of birth of the prosecutrix (PW1).

10. If the date of birth of the prosecutrix (PW1) is taken as 10.07.1986, then, on the date of the incident, the prosecutrix (PW1) would be around 15 years and six months. Keeping in mind the evidence which has emerged in the present case vis-à-vis the age of the prosecutrix (PW1), I am of the view that the benefit of doubt should go to the appellant/ accused for the reason that both the Exhibits, Ex. PW6/B, which is the application form for registration/admission of St. Andrews Scots Senior Secondary School, and Ex. PW6/C, which is a document produced by Sarvodya Laghu Mahyamik Vidyala, clearly indicate that there is over-writing crucially with regard to the year of birth of the prosecutrix (PW1). The said interpolation, when seen in the light with the ossification report (Ex. Mark 'X'), and the contradictions in the testimony of the mother (PW7), and the inconsistency as to who handed over Ex. PW 6/B to the police, as has emerged from the testimony of constable Pawan Kumar (PW8) and I.O. (PW15), clearly casts doubt with respect to the age of the prosecutrix (PW1) on the date of incident, as propounded by the prosecution.

11. In these peculiar circumstances, I would grant the benefit of doubt to the appellant/accused. Unfortunately, in the impugned

order, as observed by me above, the trial court has not only not dealt with the aspect, as to whether or not the prosecutrix (PW1) was subjected to sexual intercourse with her consent, but also failed to deal with the other crucial aspect which is discussed above, that is, the interpolation of Ex. PW6/B and PW6/C. The trial court, without discussing the anomalies in the said evidences, came to a conclusion of conviction, in my view erroneously, by applying the case law, without appreciating or weighing the evidence which has come on record in the instant case. As to how the trial court has recorded the conclusion in paragraph 21 of the impugned judgment to the effect, that it is proved that the prosecutrix (PW1), on the date of the incident, was below the age of 18, is a complete mystery.

12. For the reasons given hereinabove, the appeal is allowed and the impugned judgment is set aside. The appellant/accused is acquitted of the offences, with which he has been charged in the instant case. The appellant/ accused shall be set free, in the event, he is not required in any other case.

RAJIV SHAKDHER, J

SEPTEMBER 22, 2009
kk