

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A.(J) No.48 of 2023

Sri Shamim Ahamed,
Son of Amir Hossain,
Resident of Hirapur, Maharani,
P.S. R.K. Pur, District:Gomati Tripura

---- Appellant(s)

Versus

The State of Tripura

----Respondent(s)

For Appellant(s)	:	Mr. S. Lodh, Adv.
For Respondent(s)	:	Mr. Samrat Ghosh, Addl. P.P.
Date of Hearing	:	23.07.2024
Date of delivery of Judgment and Order	:	06.08.2024
Whether fit for Reporting	:	YES

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT**

Judgment & Order

[B. Palit, J]

This appeal is directed challenging the judgment and order of conviction and sentence dated 11.09.2023 and 13.09.2023 delivered by Learned Special Judge, Gomati District, Udaipur in connection with Special (POCSO) 17 of 2021. By the said judgment the Learned court below sentenced the convict to suffer RI for a period of two years and to pay a fine of Rs.3,000/- in default to suffer further RI for two months under Section 363 of IPC. The convict was further sentenced to suffer RI for 20 years and to pay a fine

of Rs.10,000/- under Section 4 of the POCSO Act in default to suffer further RI for six months and he was further sentenced to suffer RI for six months and to pay a fine of Rs.1,000/- for his conviction under Section 506 of IPC in default to suffer further RI for one month with further direction that all the sentences shall run concurrently.

02. Heard Learned counsel Mr. S. Lodh representing the appellant and also heard Mr. S. Ghosh, Learned Addl. P.P. representing the state-respondent.

03. Before coming to the conclusion of this appeal let us discuss about the subject matter of the prosecution in brief. In this case the prosecution was set into motion on the basis of an FIR laid by one Lipika Sarkar alleging inter alia that on 18.03.2021 at around 10.30 a.m. her minor daughter (name withheld) aged about 14 years a student of class-IX was proceeding towards her school on foot. On the way when she reached at Taltola that time the accused appellant approached her to give a lift by his motor bike to her school to which she contended and boarded his bike. Thereafter the accused appellant brought her to Eco Park at Tepania by the said bike riding with high speed. In the said park the accused appellant forcefully embraced her daughter and kissed her cheek. Then her daughter began to cry to which she was threatened by the appellant-accused and after that she was sent to her school by an auto and then she came back to home and narrated the incident to

her mother, i.e the informant. Accordingly the FIR was laid by the informant.

04. O/C, R.K. Pur Women PS accordingly on receipt of FIR registered FIR No.14 of 2021 dated 20.03.2021 under Sections 354/506 of IPC and Section 8 of the POCSO Act and endorsed this case to WSI Purnima Das Sarkar for investigation. Accordingly the I.O. took up investigation of this case and during investigation on the prayer of I.O. Section 376 of IPC and Section 4 of POCSO Act was added in this case and the case was further assigned to WSI Ripita Bhattacharjee who on completion of investigation laid chargesheet against the accused-appellant for his prosecution before the court. Thereafter cognizance of offence was taken and the Learned Special Judge after hearing the parties framed formal charge under Section 363/376/506 of IPC and also under Section 4 of the POCSO Act against the appellant to which he pleaded not guilty and claimed to be tried. During trial prosecution to substantiate the charge adduced in total 12 numbers of witnesses and certain documents were marked on behalf of the prosecution as exhibits and after closure of prosecution evidence the appellant was examined under Section 313 of Cr.P.C when he denied the prosecution evidence and expressed his willing and desire to adduce evidence. Accordingly on behalf of the appellant four witnesses were examined. Finally on conclusion of trial Learned court below found the appellant to be guilty and convicted him thereon.

Challenging that conviction the present appeal is before this court.

05. At the time of hearing of argument Learned counsel appearing for the appellant fairly submitted that in this case the evidence of prosecution suffers from various infirmities for which the charge against the appellant cannot sustain but the Learned court below did not consider the same but found the appellant to be guilty and convicted him accordingly for which the interference of the court is required. Learned counsel further submitted that from the evidence on record it appears that the alleged incident took place inside the Tepania Park but according to victim the alleged incident took place outside the Tepania Eco park because from the evidence of the prosecution witnesses it transpires that on the alleged day the said park was closed. Learned counsel also submitted that there was no such explanation in this regard from the side of prosecution. It was further submitted that according to the prosecution the alleged appellant-accused drove the bike in high speed. But from the evidence on record it would be clear that on that relevant point of time the alleged road was very busy, so it was not possible on the part of the accused-appellant to drive the bike in high speed for which there is no scope to place any reliance upon the evidence of the prosecution and more so, according to Learned counsel from the alleged spot the victim was alleged to have boarded the bike of the appellant and the alleged P.O. is situated at a long distance

and on the way so many trijunction falls, but the victim did never raise any voice that she was forcefully taken by the alleged accused. So according to Learned counsel in course of argument of hearing the prosecution also has failed to explain this infirmities found on the evidence of record of the prosecution witnesses including the evidence of the victim girl. Learned counsel further submitted that the prosecution in this case could not prove the age of the victim in accordance with law that on the alleged day she was a minor. Situated thus, no charge under the POCSO Act could lie against the appellant. But the Learned court below ignoring all these aspects found the appellant to be guilty and finally Learned counsel for the appellant submitted that since the evidence on record of the prosecution suffers from various infirmities so the present appellant deserves acquittal and urged for allowing this appeal by setting aside the judgment and order of sentence and conviction of the Learned court below.

06. Per contra, Learned Addl. P.P. Mr. S. Ghosh appearing on behalf of the prosecution i.e. the state-respondent submitted that in this case the Learned court below rightly on the basis of the evidence on record of the prosecution found the appellant to be guilty and convicted him accordingly and as such at this stage there is no scope to allow the appeal and to set aside the judgment of the Learned court below. Learned Addl. P.P. further submitted that the witnesses of the prosecution were thoroughly

cross-examined by the accused-appellant but the evidence of the material witnesses could not be shattered at any length by the accused-appellant. Furthermore, according to Learned Addl. P.P. regarding the alleged P.O. as submitted by Learned counsel for the appellant there may be some variation because the victim for the first time went to that place and which was also a big area, so it was not possible on her part to whisper about the exact identification of the P.O. as to whether the same was inside the park or outside the park or not. Learned Addl. P.P. further submitted that on the statement of the victim girl the informant disclosed that the incident took place inside the Tepania Park so for this minor contradiction there is no scope to disbelieve the evidence on record of the prosecution. As alleged by the appellant that the victim did not raise her voice at the time of riding the bike by the alleged appellant in this regard Learned Addl. P.P. submitted that since the accused appellant was known to the victim earlier so when she boarded the bike voluntarily that time there was no scope on her part to raise any voice but she could realize after crossing over a certain route that the appellant was driving/riding the same in different direction without going to her house that time she might have asked the appellant to stop but that was not adhered by the appellant. So the submission of Learned counsel for the appellant that the victim did not raise any voice was not correct and cannot be accepted in accordance with law. Learned Addl. P.P. further

submitted that the medical evidence on record clearly indicates that on the alleged date and time the present appellant committed rape upon the victim girl knowing the same to be a minor. So the Learned court below rightly and reasonably found the appellant to be guilty and convicted him accordingly and there is no scope to disbelieve the prosecution evidence in this regard. Learned Addl. P.P. finally submitted that the appellant by adducing defence witness also could not raise any doubt about the prosecution story. So legally there was no scope to place any reliance upon the evidence and finally urged for dismissal of this appeal upholding the judgment and order of conviction of the Learned court below.

07. Now let us discuss the evidence on record of the prosecution as well as the appellant in respect of the prosecution case. The prosecution as already stated has adduced as many as 12 numbers of witnesses. PW-1, Lipika Sarkar is the mother of the victim. According to her the victim was born on 18.10.2005. On the day of incident she was a student of Class-IX of East R.K. Pur Girls High School and was aged about 14 years. On 18.03.2021 she left for her school and on the way Md. Shamim Ahmed who is a resident of Maharani and previously known to them being a private tutor of a student offered to drop her daughter to her school in his bike. Initially her daughter refused but being persuaded she boarded the bike with said Shamim Ahmed. But he did not drop her to school rather took the

motor cycle to Tepania park ignoring the protest of her daughter. He also threatened her daughter to keep quiet or face dire consequences. On reaching the park they found it was closed. He then took her daughter to a jungle on the backside of the park. Then he proposed to marry his daughter and when his daughter refused, he brought out a knife and on the face of knife he forcibly raped her daughter. He also threatened to kill her daughter if she raises her voice. Later on, at about 1 p.m. in the afternoon he put her daughter in a auto which dropped her daughter in front of her school from where she returned back to home. On reaching home she was crying and being enquired by her she (the victim) narrated the entire incident to her. She further stated that her husband at that time was not at home. He returned back at around 9 p.m. and then they discussed the matter and on the next day they approached police. She further stated her FIR was written by one Narayan Debnath, advocate's clerk. In the FIR she did not mention rape to protect the dignity of her daughter. She identified her signature on the FIR marked Exbt.P-1. She further stated that during investigation police seized the birth certificate of her daughter. The witness identified her signature on the seizure list dated 20.03.2021 marked as Exbt.P2. She further identified the birth certificate seized from her which was marked as Exbt.P3.

During cross-examination she stated that she told police the time when her husband returned back to

home at night. She was confronted with the statement that she stated to I.O. that in the night at around 9 p.m. her husband returned back to home when they discussed the matter and on the next day they approached the police. But that portion of statement was not found in her statement recorded by I.O. under Section 161 of Cr.P.C. She further stated that the FIR was lodged at around 12 p.m. in the afternoon on the following day. She was also confronted with the statement that she told I.O. the reason for delay of lodging the FIR but that was not found in her statement recorded by I.O. She further stated that she was unable to say as to whether there were three routes from the school to hospital. To reach Tepania from the school one has to pass through Brahmabari Traffic point, Ramesh Choumuhani Traffic lights, Rajarbag Motor Stand, Udaipur College, Don Bosco School. Both at Brahmabari and Ramesh Choumuhani there are presence of traffic police and there is a large gathering at all the above mentioned points during office and school hours. She further stated that her daughter was not aware of the road. She also stated that the accused used to provide private tuition to many students in the locality. Nothing more came out relevant.

08. PW-2 is the victim. She deposed that on 18.03.2021 she was proceeding towards her school at around 10.30 am when she was a student of Class-IX of East RK Pur Girls' High School. That time Md. Shamim who is previously known to her being a private tutor of her

neighbour approached her on a bike. Initially she declined but on his insistence she boarded the bike. But instead of dropping her in front of the school he kept riding the bike. When she requested to drop the bike he threatened her with dire consequences and asked her to keep her mouth shut. He took her to the Tepania Park which was closed. He then took her to a jungle behind the park. Then he proposed to marry her which she declined. Thereafter he brought a knife from his bag and threatened to kill her. He forced her to disrobe of her school uniform. He then forcefully had sex with her against her will. Thereafter at around 1 p.m. in the afternoon he brought her to the main road and hired an auto and asked her to board the same. The auto dropped her to school from where she returned back to home. At that time her father was not present. She narrated the incident to her daughter. Subsequently police brought her to a Magistrate to whom she narrated the entire incident. She identified her signature on the statement which was marked as Exbt.P4/1. Police took her to hospital where she was subjected to medical examination.

During cross-examination she stated that it takes half an hour to reach her school from her house. She was confronted with the statement the accused brought her to a jungle behind the park but that part was not found in the statement of witness recorded by I.O. But she admitted that she made such statement to the I.O. of this case. She did not tell the police that the route taken by the accused while

taking her to the park. She could not say the number, colour etc. of the bike. She reached home on that day at about 1.30 p.m. in the afternoon. She also denied to have any previous history of sexual intercourse. Nothing more came out relevant.

09. PW-3, Shibani Sarkar deposed that the victim of this case is his daughter and the informant is his wife. On 18.03.2021 he returned from work at around 8.30 p.m. On return to his house his wife told that their daughter while on her way to school was forcibly taken by the accused Shamim Ahmed to Tepania Eco Park where she was raped against her will. On the next day he accompanied with his wife and daughter to the police station where his wife lodged a complaint. During course of investigation police seized the birth certificate of his daughter and identified his signature on the seizure list marked Exbt.P2/1. He further stated that his daughter was aged 14 years at that time. Nothing came out relevant during cross-examination.

10. PW-4 Rupasree Debbarma deposed that on 20.03.2021 she was posted as Constable at RK PUr Women PS. On that day WSI Purnima Das(Sarkar) seized the original birth certificate of the victim by preparing a seizure list and took her signature on the seizure list and the witness identified her signature on the seizure list marked Exbt.P2/2. She was declined to cross-examine by the appellant.

11. PW-5, Gitanjalai Jamatia deposited that on 20.03.2021 she accompanied WSI Purnima Das to Gomati District Hospital where in connection with RK Pur Women PS Case No.14/2001 madam seized some blood and biological samples of victim collected by Dr. Nista Das. She put her signature on the seizure list and identified the same marked Exbt.P5.

12. Similarly PW-6 Arpita Majumder also deposed in the same manner like PW-5 and identified her signature on the seizure list marked Exbt. P6.

13. PW-7, Narayan Debnath is the scribe who stated that on 19.03.2021 as per narration of the informant, Lipika Sarkar he wrote the ejahar and he read over the contents to the informant. On admission by informant that it was correctly written he signed as a scribe and on identification the FIR was marked Exbt.1/1. During cross-examination nothing came out relevant.

14. PW-8, Mampi Das deposed that on 22.03.2021 she was posted in Tripura Sundari Sub-Divisional Hospital and on that day in connection with RK Pur Women PS Case No.14/2001 madam seized some blood and biological samples of the accused Shamim Ahmed by Dr. Siddhartha Das and the witness identified her signature on the seizure list marked Exbt.P6/1. She was declined to cross-examine by the appellant.

15. PW-9, Dr. Nishtha Das deposed that on 20.03.2021 she was posted as Medical Officer at District

Hospital, Gomati. On that day she examined the victim aged about 15 years in connection with RK Pur Women PS case No.14/202. During examination she found that her hymen was recently torn at 6 O'clock position. The age of injury was around 1/2 day. She collected urethral, vaginal and anal swab and handed over the same to the police for analysis. Besides the physical examination she was of the opinion that there are signs suggestive of forceful penetration of vagina. She further clarified that the victim had no previous sexual history. She identified her report marked Exbt.P7 in five sheets of paper. He also stated that the police seized the swab collected by her by preparing a seizure list and identified her signature on the seizure list marked Exbt.P5/1.

During cross-examination she stated that there was no other injury in the victim except the tear in the hymen. Hymen can tear in other ways also. She further clarified that it was not necessary that in case of forceful penetration there must be tenderness or swelling in the inner aspect of the thigh. Nothing more came out relevant.

16. PW-10, WSI Purnima Das Sarkar deposed that on 20.03.2021 OC, RK Pur Women PS registered the case and she endorsed the same to her for investigation. She identified the signature of Alpana Sarkar in the FIR marked Exbt.P1/2. She also identified the printed FIR form which was marked as Exbt.P8 in three sheets of paper. On receipt of investigation she perused the FIR recorded statement of

victim as well as her mother. She seized the birth certificate of the victim by preparing a seizure list marked Exbt.P2/3. She further stated that she took the victim for medical examination to the hospital and after the medical examination the Doctor handed over urethral, vaginal, anal swab and blood sample of the victim which she seized by another seizure list dated 20.03.2021. She also identified the seizure list marked Exbt.P9. On the day itself she recorded the statement of Soma Muhuri, Gitanjali Jamatia and Rupashree Debbarma. On 21.03.2021 she visited the place of occurrence. There were two P.O.s and on identification of the first P.O. the map marked as Exbt.P10 along with index marked Exbt.P10/1 and the second P.O. marked Exbt.P11. She also stated that she arranged for recording the statement of victim under Section 164(5) Cr.P.C. She further stated that Dr. Siddhartha Nath collected the blood sample of the accused which she seized by seizure list dated 22.03.2021 marked Exbt.P6/2. The swabs and the blood collected from the accused went to SFSL for forensic analysis. On 22.03.2021 she recorded statement of Arpita Majumder, Mampi Das. On 27.03.2021 she collected the medical report of the accused from the hospital. She also collected the medical report of the victim.

During cross-examination she stated that the FIR does not contain any information regarding rape. She further stated that as per statement of the victim given to the Magistrate that the incident took place inside Tepania

Park. She did not name the road on which 'A' the PO is situated. Map does not indicate how far East RK Pur School is from the PO and there is no land mark indication in her map to identify the PO and there was also no land mark indication about the second P.O and the hand sketch map does not indicate the boundary of the Tepania park. She did not examine any Forest Official posted in the Tepania Park. She further stated that on that day the park was closed. She did not seize the wearing apparels of the victim or the accused. She further stated that the distance between the two PO is around 6 kms. There were three routes to reach PO 1 to PO 2. She stated that the alleged kidnapping took place at around 10 am, i.e. school time. She further admitted that during the school time the above noted route will be busy with traffic. She further stated that the witness PW 2 Purnima Sarkar did not tell her that the accused took her to a jungle behind the park and also she did not make any endeavour to find out the name of the driver or number of auto rickshaw by which the victim came back to home.

17. PW-11, Ripita Bhattacharjee deposed that on 01.06.2022 she was posted as WSI of police R.K. Pur Women PS and on that day OC, PS Alpana Sarkar re-endorsed the RK Pur Women PS Case No.14/2021 to her for investigation. Accordingly after receiving the case docket she received final medical report of the victim and submitted chargesheet against the accused appellant Shamim Ahmed.

During cross-examination she stated that she contacted with the witnesses but did not record their statement afresh as there was no departure to their respective statements made by them earlier to the I.O. and she also admitted that she did not ascertain which route was taken to take the victim from PO1 to PO2.

18. PW-12, Birendra Mohan Jamatia deposed that on being summoned he produced the original Registrar of Birth kept in the office of Registrar of Births & Deaths containing the entries at SI No.1788-05. He confirmed the contents of Exbt.P3 in comparison with original registrar.

19. As already stated to counter the prosecution case, the appellant in course of his examination under Section 313 of Cr.P.C. desired to adduce his witnesses in support of his defence. Accordingly four witnesses were adduced by him.

20. DW-1, Safiya Khatun deposed that she had engaged Shamim Ahmed as the private tutor of her son who was a student of Navoday Bidalay. The complainant is her neighbor and just a few days before her son's exam Lipika told her to discontinue Shamim. She informed the matter to Shamim and requested him to continue till the examination is over. But a few days later he had been arrested by the police. From the evidence of said witness it appears that there is no evidence of the defence countering the prosecution story.

21. Similarly DW-2 Humayun Kabir deposed that he was a student of third year in the Netaji Subash College at Udaipur. He along with 11/12 other students took tuition for competitive exam from Shamim Ahamed in the year 2021. At that time he share with them the fact that he had some tuitions at Bondowar. However, one lady of that area opposed to his tuitions and threatened him with false implication. During cross nothing came out relevant.

22. DW-3, Mrinal Hossain deposed that on 18.03.2021 at around 10.30 am he was present in CPI(M) party office on the bank of Jagannath Dighi and that time accused was also present. There was a meeting scheduled at 11.00 a.m which was presided over by Comrade Manik Biswas. The meeting continued till 01.00 pm.

During cross-examination he stated that he did not produce any document to show that he is a member of the CPI(M) party nor he submitted any document that the meeting took place by showing any resolution.

23. Similarly DW-4, Sohel Aktar also deposed in the same manner that on 18.03.2021 at around 10.30 am he was present in CPI(M) party office on the banks of Jagannath Dighi. At that time accused was also present. There was a meeting scheduled at 11.00 am and the meeting was attended by Comrade Manik Biswas & others and the meeting continued till 01.00 pm and Shamim attended till the end.

During cross-examination he deposed that he has not produced any document showing that he was a member of the CPI(M) Party. No resolution of the meeting was submitted.

These are the synopsis of the evidence on record of the appellant before the Learned Trial court below in support of his defence. From these witnesses nothing came out to disbelieve the prosecution story.

24. During the course of argument Learned counsel appearing for the appellant relied upon two citations in order to support his case. In **Krishan Kumar Malik vs. State of Haryana** reported in **(2011) 7 SCC 130**, Hon'ble the Supreme Court in para Nos.22, 25, 31, 43 and 44 observed as under:

"22. Admittedly, the prosecutrix had travelled certain distance in the Maruti van after her alleged abduction but she did not raise any alarm for help. This shows her conduct and behavior during the whole process and renders her evidence shaky and untrustworthy. The statement of the prosecutrix that in all 11 persons were there in the Maruti van renders it further doubtful as it would be extremely difficult for 11 persons to be accommodated in the Maruti van, the seating capacity of which is only 5.

25. Needless to say the solitary evidence of the presecutrix to bring home the charge of abduction and commission of rape by the appellant does not inspire confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to hold the appellant guilty of commission of the said offence. We hold so, on account of many other circumstances, which are against the prosecution, narrated hereinbelow.

31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offence.

43. With regard to the matching of the semen, we find it from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn. (1965) as under:-

Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant.

44. Now, after the incorporation of Section 53-(A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

25. In **Jarnail Singh vs. State of Haryana** reported in **(2013) 7 SCC 263**, Hon'ble the Apex court observed as under:

21. In order to support his contention, that the prosecutrix was not a minor at the time of occurrence, learned counsel for the appellant placed reliance on the judgment rendered in **Sunil vs. State of Haryana**, AIR 2010 SC 392. Ordinarily, we would have extracted the observations on which reliance was placed, but for reasons that would emerge from our conclusion, we consider it inappropriate to do so.

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

12. Procedure to be followed in determination of age-(1) In every case concerning a child or a juvenile in conflict

with law, the court or the Board or as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

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

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

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

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

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, Section 64 of the Act and these rules, no further inquiry shall be

conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

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

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, 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. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

Referring the same Learned counsel for the appellant drawn the attention of the court that the prosecution in this case has failed to prove the charge levelled against the accused appellant that on the alleged

day the appellant brought the victim to Tepania park and thereafter committed the offence. Furthermore, the prosecution also has failed to prove the age of the victim in accordance with law. So according to Learned counsel since the evidence of prosecution suffers from infirmities and the appellant deserves acquittal in this case. As such, Learned counsel urged for allowing the appeal by setting aside the judgment.

26. On the other hand Learned Addl. P.P. in addition to his submission also relied upon few citations. In **State of Uttar Pradesh vs. Chhotey Lal** reported in **(2011) 2 SCC 550** Hon'ble the Apex court in para nos.21, 22, and 23 observed as under:

"21. In Uday v. State of Karnataka: (2003) 4 SCC 46 this Court put a word of caution that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The Court at page 57 of the Report stated:

21.....In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact.

22. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

23. In State of Maharashtra v. Chandraprakash Kewalchand Jain:(1990) 1 SCC 550 this Court at page 559 of the Report said:

16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

27. In State of Uttar Pradesh vs. Krishna Master and Others reported in **(2010) 12 SCC 324**, Hon'ble the Supreme Court held as under:

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error

committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case.

29. At this stage, it would be well to recall to the memory the weighty observations made by this Court as early as in the year 1988 relating to appreciation of evidence and the duties expected of a Judge presiding over a criminal trial. In *State of U.P. v. Anil Singh*, AIR 1988 SC 1998, it is observed as under:

...in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also

presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

Referring the same Learned Addl. P.P. submitted that here in this case although some minor contradictions are there, but the prosecution has projected the case in such a manner that there is no room to disbelieve the evidence on record of the prosecution.

28. We have heard the argument of both the sides at length and gone through the evidence on record very carefully. Since in this case there are two sets of evidence both by the prosecution and the accused-appellant. So we are to scrutinize the evidence on record of the prosecution very carefully. As already stated the prosecution to substantiate the charge has adduced 12 numbers of witnesses in support of the prosecution story and on the other side to discard the prosecution story the appellant has adduced 4 numbers of witnesses. From the side of the prosecution the victim and her parents were adduced and other witnesses of the prosecution are connected to the investigation part. So their evidences are not material for decision of this case. There is no evidence on record before us that on the alleged day at the time of occurrence of offence excepting the victim some other persons are/were there who have witnessed the occurrence of offence because on the alleged day at the time of proceeding towards school the victim met with the accused who was riding a bike and requested her to give lift up to school but

without going to the school he rushed towards Tepania park area where he committed the offence. Learned counsel for the appellant in course of hearing of argument drawn the attention of the court the prosecution could not explain the exact P.O. whether it was inside the park or outside the park or not.

29. On the contrary, the victim in course of her examination stated that the accused appellant committed the offence to the back side of the park as the park was closed. It is also on record for the first time she went there. So it was not possible on the part of the victim to say about the exact area and location of the park as to whether the crime committed outside or inside the park or not. So the plea of defence that the prosecution failed to explain the exact place of occurrence cannot be accepted and more so, the mother of the victim after hearing the said fact from her stated that the incident took place inside the Tepania park. This plea of the defence cannot be accepted to disbelieve the prosecution story. Another plea was raised that when the alleged appellant was proceeding towards Tepania along with the victim in high speed the victim did not raise any voice but she did not which also casts a doubt about the prosecution story. In this regard it is submitted that the victim was earlier known to the accused appellant. So she had no occasion to raise any voice and furthermore the route through which the appellant was proceeding with her was unknown to her, so naturally there was no scope to

raise any voice and furthermore when she could understand that the appellant was proceeding towards a wrong direction that time she raised voice but due to threatening she could not say anything. So this plea of the appellant also cannot be accepted. Now if we go through the medical evidence on record it will transpire that on the alleged day the appellant accused committed rape upon the victim. The appellant by the trend of cross-examination could not in any manner raise any cloud to disbelieve the evidence of the parents of the victim and the Medical Officer also. Thus from the evidence on record it appears that the appellant by the art of cross-examination could not in any manner raise any doubt to disbelieve the case of the prosecution. As already stated, that the appellant in course of his examination under Section 313 of Cr.P.C. desired to adduce witness and accordingly four witnesses were adduced by the appellant before the Learned Trial court below.

30. In course of examination under Section 313 of Cr.P.C. the appellant took the plea that on that relevant point of time he was in a meeting at CPI(M) party office from 10.30 a.m. to 1. p.m. and two witnesses of the appellant tried to support his version. But during cross-examination it appears that they specifically stated that no resolution of the meeting was produced before the court to substantiate that plea and even those DWs 3 and 4 specifically stated that no such documentary evidence on record were adduced by them to substantiate that they

were the members of CPI(M) party. So virtually there is no scope to place any reliance upon the evidence of DWs 3 and 4 and the other witnesses of the appellant i.e. the DWs 1 and 2 could not inspire any confidence of the court to disbelieve the prosecution story. Thus it appears that the appellant has failed to satisfy the Learned court below that on the alleged day he was not present to the P.O. rather he was busy in a meeting of CPI(M) party office by adducing any cogent and reliable evidence on record. As already stated, that the appellant by the trend of cross-examination of the material witnesses of the prosecution failed to make any defence to disbelieve the prosecution story. The citations as referred by the Learned counsel appearing for the appellant are distinguishable in facts with the present case. So we do not find any scope to apply the same principle in the present case, rather the citations referred by Learned Addl. P.P. appears to be more reasonable and justified. Prosecution in this case also has been able to prove the age of the victim by showing any documentary evidence on record. Situated thus, on the face of the evidence on record it appears that the Learned court below rightly and reasonably convicted the appellant in this case for which we do not find any scope to interfere with the judgment delivered by the Learned Trial court.

31. In the result, the appeal filed by the appellant stands dismissed. The judgment and order of conviction and sentence dated 11.09.2023 and 13.09.2023 passed by the

Learned Special Judge, Gomati District, Udaipur in connection with case No.Special (POCSO) 17 of 2021 stands affirmed.

Send down the LCRs along with a copy of this order.

Pending application, if any, stands disposed of.

JUDGE

JUDGE



**MOUMITA
DATTA**

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