

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.21 of 2015

Arising Out of PS.Case No. -27 Year- 2006 Thana -BELAGANJ District- GAYA

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1. Md. Ashique Mistri S/o Late Md. Amin Miyan, R/o Village- Laxmipur, P.S. Belaganj, District- Gaya

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Surendra Kumar Singh, Adv

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 24-08-2017

Sole appellant, Md. Ashique Mistri has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 25,000/ in default thereof, to undergo SI for 1 year additionally, vide judgment of conviction dated 26.11.2014 and order of sentence dated 28.11.2014 passed by Additional District and Sessions Judge-3rd, Gaya in Sessions Trial No. 436/2009/406/2006.

2. Name withheld, PW-1 gave her Fard-e-beyan on 22.02.2006 divulging the fact that she happens to be aged about 16 years. As she was suffering from some sort of ailment and for that, she was being treated. During course thereof, about 7-8 months ago, she had gone to Patna along with Md. Ashique Mistri who happens to be her uncle to see Dr. Md. Ejaz Ali. Because of the fact that the aforesaid doctor used to see patients in the night, they stayed there after having been seen by the doctor in the following morning, they returned back. After 15 days, they both visited place of the doctor.



Doctor had seen her at about 10.00 PM. She slept with her uncle, Md. Ashique Mistri over roof. While she was asleep, her uncle began to tease her and then untied her clothe which she protested whereupon, he said that nothing will happen. He threatened also that in case of raising alarm, she will have to face dire consequences, as a result of which, she became very much afraid of and taking advantageous position, Md. Ashique Mistri committed rape. On the following morning, while they were returning, he continued with threatening that in case of discloser, not only she rather her whole family will be eliminated. She had not disclosed the event of rape to her family members out of fear. Subsequently thereof, some sort of differences cropped up in both the family with regard to cash transaction. About three months thereafter, while she was accompanying a kid to meet the nature's call, Md. Ashique Mistri caught hold of her, took her to the husk room and then committed rape. At that very moment also, he had threatened her and so she had not disclosed the event to her family members. About 15 days thereafter, while she was going to purchase milk, again became victim of lecherous activity of Md. Ashique Mistri. As she was indolent, she became unable to perceive regarding her pregnancy at an earlier moment. About 3-4 days ago, she perceived abnormal activity in her stomach, on account thereof, she disclosed the event to her family members whereupon she was taken to a Nurse who confirmed it a case of pregnancy. Then thereafter, the matter was



discussed in the village and as per direction of the villagers, this case has been instituted.

3. On the basis of the aforesaid Fard-e-beyan, Belaganj PS Case No. 27/2006 was registered, followed with an investigation. After completing the same, charge-sheet was submitted facilitating the trial, the subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement under Section 313 CrPC is that of complete denial. It has also been submitted that the victim as well as her mother happen to be promiscuous women and on account thereof, their paramours always remain at their place whereupon, their indulgence in sexual activity ultimately, cost prestige of the victim by way of pregnancy. As the appellant was protesting their illegal activity, he has been involved in this false and frivolous case. However, appellant has not taken pain to examine any witness in his defence nor exhibited any kind of document.

5. In order to substantiate its case, prosecution had examined altogether 12 PWs out of whom PW-1, victim, PW-2, Md. Raza Alam, father of the victim, PW-3 Md. Javed Akhtar, co-villager, PW-4, Md. Imteyaz, co-villager, PW-5, Md. Faiyaz Ahmad, uncle of the victim, PW-6, Md. Shahabuddin, uncle of the victim, PW-7, Aminuddin @ Md. Amin Miyan, co-villager, PW-8, Naushad Akhtar, FIR attesting witness, PW-9, Md. Akbar, FIR attesting witness, PW-10, Md. Sarfaraz, FIR attesting witness, PW-11, Md. Mushtak, cousin



brother and PW-12, Dr. (Mrs.) Sushma Singh as well as had also exhibited Ext-1, Signature of PW-1 over Fard-e-beyan, Ext-2 series, signatures of respective FIR attesting witnesses, Ext-3, Medical Report.

6. While assailing the judgment of conviction and sentence, learned counsel for the appellant has submitted that irrespective of suggestion having been given at the end of appellant, it is an obligation of the prosecution to prove its case beyond all reasonable doubt. Until and unless, prosecution version is found duly substantiated then and then only, the obligation having on the part of the accused to rebut the theme of non consent at the end of the victim would arise. So, submitted that first of all, it has to be seen whether the prosecution has succeeded in proving its case. In order to strike over the same it has been submitted that admittedly, at the time of occurrence, mother, PW-1 was not present, as father, PW-2, during intervening period was staying at Dhanbad having been informed by the mother of the victim whereupon he came. Mother has not been examined. The prosecution has not explained the reason for her non examination whereupon evidence of PW-2 became inadmissible. In likewise manner, it has also been submitted that the Investigating Officer has also not been examined. From the nature of evidence having adduced on behalf of prosecution, the same appears to be capricious whereupon defence case is found prejudiced. On the



aforesaid score alone, appellant is entitled to be acquitted.

7. Now coming to other aspect, it has been submitted that from the evidence of PW-1, victim as well as PW-2, her father, presence of other uncles are there, who had also deposed during trial negating the allegation coupled with the fact that their presence improbabilized the prosecution version to have company of appellant to carry the victim to Patna. . In likewise manner, the activities so divulged by the victim at subsequent time without any protest at the end of appellant even though she went at her place having company of her mother with whom she might have shared her suffering, if so, is another circumstance which suggests that she was anyhow, a consenting party and that being so, her status is to be acknowledged accordingly and for that, the learned counsel for the appellant drew attention towards the evidence of PW-12, the doctor who had estimated the age of the victim to be in between 16-17 years. It has also been submitted that the aforesaid finding has got variance of plus minus two years either side and the event going in favour of accused is to be accepted, on account thereof, majority of the victim should be confirmed and that being so, it is a fit case whereunder appellant should be acquitted.

8. Furthermore, it has also been submitted that coming to the status of the witnesses it is evident that PWs-4, 5, 6, 7, 8, 9, 10 and 11 have not supported the case of the prosecution, more particularly,



identifying the appellant to have accompanied the victim to Patna as well as with regard to subsequent event probabilizing an opportunity to rape the victim and that being so, the evidence of PWs-2, 3 being hearsay will not improve the fate of the prosecution case. So, the evidence of PW-1, the victim now remains which, on account of improbability persisting in her evidence did not inspire confidence. That being so, the overall situation suggests that prosecution has failed to substantiate the case, consequent thereupon, the appellant is found entitled for acquittal.

9. Learned APP confronting the argument having been made on behalf of the appellant, has submitted that so far pregnancy of PW-1, the victim is concerned, all the witnesses have reiterated the same. It is also evident from their deposition that she was unmarried. Furthermore, PW-1, the victim happens to be consistent over the activity taken up by the appellant at different occasions. On account of tender age of the victim, as well as social stigma which, the victim of rape is to carry coupled with the fact that the victim happens to be unmarried which might have adverse impact upon her future as well as having been threatened, at the end of the appellant being immature whereunder not only she succumbed rather she also failed to disclose the event at an earlier occasion. However, when she perceived some sort of abnormality in her physical condition, she disclosed the event which got confirmed and for that, the victim had disclosed the appellant to be responsible as she was raped by him. Apart from this,



it has also been submitted at the end of learned APP that there happens to be no motive for false implication. In the aforesaid background, the evidence of victim, which has got primacy, so far rape is concerned, is to be accepted without corroboration. Moreover, from the evidence of victim, PW-1, it is apparent that she has not been cross-examined over occurrence, and that being so, the learned lower court rightly held guilty, whereupon, judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

10. Before coming to analyze the evidence, certain salient features coming out from the record, is also to be perceived. Victim was unmarried and was pregnant at the time of institution of the case, which might be due to rape or indulging in consensual physical relationship, and for that, status of victim is also to be properly ascertained. In likewise manner, inordinate delay in launching of prosecution is also found exposed.

11. PW-12 is the doctor who had examined the victim and found her to be pregnant of 27 weeks + 6 days. She had further disclosed her age to be in between 16-17 years. So far estimation of age is concerned, it is evident from the evidence of PW-12 that she being a Gynecologist was not at all specialized on that very score, nor board of doctors were constituted for ascertaining her age having presence of orthopedic and radiologist, however, she has reported on the basis of the x-ray report as well as counting the teeth 7+7 upper as



well as lower jaw (28 in number). It is evident from her cross-examination that her finding with regard to pregnancy of PW-1, has not been challenged. So, pregnancy out of physical sexual relationship is found duly substantiated.

12. Now coming to the remaining witnesses, it is evident that PW-4 who had stated that he came to know regarding pregnancy of the victim but he is unable to say by whom. He had further stated that the police had recorded his statement but subsequently, he resiled whereupon was declared hostile. During cross-examination, he had stated that victim as well as her mother happens to be characterless where their paramours used to stay.

13. PW-5 is one of the uncles of the victim who had stated that the victim is his niece. She was being treated at Gaya. Her father as well as he himself used to accompany her. She was cured. Subsequently thereof, she again developed pain in her stomach whereupon she was taken to Patna by Ashique Mistri (appellant) but he is unable to say as to what kind of sin Ashique Mistri (appellant) had committed with her. During cross-examination, he had stated that appellant happens to be his cousin brother, (Mamera). He happens to be aged about 70 years. He had further stated that he had stated before the police that victim and her mother happen to be characterless whereupon the villagers made protest but they never paid heed to it. The victim suffered pregnancy from her paramours. Appellant has



been falsely implicated.

14. PW-6 is another uncle of victim who had deposed that the victim is his niece. She happens to be unmarried but, she has begotten a daughter. He is unable to say by whom, she conceived. He further stated that he is unable to say whether the victim had gone to Patna for treatment or not. He had further stated that he had made statement before the police. Then thereafter, he was declared hostile. During cross-examination, at para-5, he had admitted the inter se relationship with the appellant. He had further disclosed the family status of the appellant. He had denied in para-6 regarding previous statement made before the police with regard to status of the victim as well as her mother to be characterless and on account thereof, they had promiscuous relationship with other co-villagers as a result of which, the victim became pregnant.

15. PW-7 is a co-villager who has stated that he does not know the victim nor with regard to the occurrence and so he was declared hostile. During cross-examination, he had stated that appellant happens to be an outsider.

16. PW-8 had stated that he knew the victim. He heard regarding the occurrence about 4-5 years ago. He came to know from the villagers that she was impregnated by the appellant whereupon, the victim had instituted a case. He had put his signature over the Fard-e-beyan. During cross-examination, he had stated that appellant



happens to be an outsider. He has children. Some of whom, are major. Whatever he came to know, he knew from the villagers. He had not made statement before the police.

17. PW-9 had stated that he knew the victim but he has got no information with regard to any kind of occurrence having been committed against her. She had given Fard-e-beyan over which he had also put his signature. Then was declared hostile. During cross-examination, he had stated that the appellant happens to be his co-villager whereupon he had identified him. He had put his signature over Fard-e-beyan.

18. PW-10 had identified his signature over Fard-e-beyan, but he narrated that he is unaware with the fact over which the case has been instituted and so he was declared hostile. During cross-examination, he had stated that the appellant happens to be an outsider. The victim's father resides at Dhanbad.

19. PW-11 had stated that he knew the victim. Firstly, he denied to have any kind of information however, again stated that he came to know regarding her pregnancy but he is unable to say by whom she was impregnated. So, he was also declared hostile. During cross-examination, he had stated that the victim happens to be her cousin sister. His uncle used to remain at Dhanbad while his family member used to stay at the village.

20. PW-3 had deposed that the victim had recorded her



Fard-e-beyan in his presence over which he put his signature. He had further stated that on 21.02.2006, they came to know regarding occurrence whereupon they had gone to victim, inquired from her, she disclosed that the appellant had committed rape upon her while he had accompanied her to the place of doctor at Patna as well as in the village also. She was threatened at the end of appellant over which, a Panchayati was convened wherein the appellant created nuisance whereupon, they instructed the victim to lodge a case. He had further stated that the victim had begotten a girl about 13 months ago. During cross-examination, at para-6, he had stated that police had not recorded his statement. About 100 villagers had gone to the Police Station. He is unable to say as to how many of them had made statement before the police. At para-7, he had stated that for the first time, he is deposing before the court regarding the occurrence. Then at para-8, 9, 10, 11, he had deposed over manner of Panchayati, persons participated including the appellant. In para-12, he had stated that Fard-e-beyan of the victim was recorded in their presence over which, five persons put their signatures. One of them, Shahnawaz died. Then thereafter, police took away the victim. They returned back. He had denied the suggestion that during course of Panchayati, the name of Usman surfaced who impregnated the victim.

21. PW-2 is the father who had stated that at the time of occurrence he was at Dhanbad. Victim happens to be his daughter who resides at his native place. She is unmarried. On an information



he came from Dhanbad. His wife told him that on account of ailment of victim, the appellant had accompanied her to Patna where he committed rape. Even at village, the appellant had committed rape as a result of which, she became pregnant. He took the victim to a nurse who affirmed the same. Then thereafter, a Panchayati was convened in the village wherein accused was also present. He declined to obey the verdict, on account thereof, the instant case has been registered. Subsequently, his daughter begotten a child who is along with her. It has also been disclosed that at the time of occurrence, the victim was aged 16 years. During cross-examination, he had stated that the accused happens to be his cousin brother (Mamera Bhai). He happens to be younger to him. He used to remain at Dhanbad where he is a hawker engaged in biscuit business. Good hospital as well as good doctors are at Dhanbad. He was informed by his daughter as well as his wife that she was ill. He had not brought his daughter to Dhanbad for treatment. Chakand and Bela are the places near to his village where doctors are available. There happens to be good hospital at Gaya. He had not brought the victim to Bela, Chakand or Gaya. In para-8, he had stated that he had not instructed his brothers to accompany the victim for treatment, however, his wife had requested even then, his brothers had not acceded. At para-11, he had stated that all the prescriptions happen to be along with the appellant who torn it. Some papers have been taken away by the police. He had not gone to the place of doctor at Patna. He is unaware whether police had gone to



the place of doctor at Patna for recording his statement as well as statement of compounder. He had denied the suggestion that the victim was aged about 24 years at the time of occurrence. He had further denied the suggestion that his wife as well as the victim happen to be characterless and having presence of their paramours by whom, the victim suffered pregnancy.

22. PW-1 is the victim. She had deposed that the occurrence took place about two years ago. On account of stomachache she was taken to Patna by the appellant to Dr. Ejaz Ali where she was attended. After a gap of 15 days, they revisited to the place of doctor along with the appellant. They arrived at the place of doctor at 9:00 PM. Thereafter, they stayed there. While she was going to sleep at the ground floor, she was taken away by the appellant to the upper floor where they slept. During aforesaid event, the appellant untied her clothe and committed rape as a result of which she sustained severe pain. She protested, even then, he continued with his illegal activity. Then thereafter, the appellant threatened her that in case of discloser, she will be murdered. On the following morning, they returned back. During midst thereof, she was again threatened. Out of fear, she had not disclosed the event to her mother. She had not accompanied the appellant further to Patna. About three months thereafter, while she was carrying her younger brother to ease, the appellant caught her, dragged her to the husk room and committed rape. During course thereof, again she was threatened and so, she kept



mum. She became so much apprehensive from the conduct of the accused that she stopped coming out of her house. After 3-4 months, unfortunately, when she came out for milk, again she was caught hold by the accused, he dragged her to the husk room and again raped her. During course thereof, she was again threatened that in case of discloser, she along with her family will be eliminated. After some time, she perceived some sort of abnormality in her stomach whereupon, she disclosed the event as to how the appellant had committed rape upon her. The news flashed in the village. His father came, took her to the doctor who affirmed. There was Panchayati and then, a case has been instituted. About three months thereafter, she had begotten a child who is with her. She is still unmarried. In para-8, 9, cross-examination has been made with regard to her family affairs. In para-9, she had disclosed regarding the status of appellant being an outsider as well as has got children out of whom, one son and one daughter are married. In para-10, she had stated that as she was suffering from pain in stomach, therefore, she had gone to Patna. She had not shown her ailment to the doctors having at Bela and Chakand. She had further stated that she had not gone to Patna before the aforesaid event. She is unaware with regard to status of the doctor. She had handed over prescription issued by the doctor to the police. She had gone to Patna along with appellant twice. She had gone with the accused only. In para-11, she had stated that the clinic of doctor lies at Mohalla-Bhikna Pahari. The doctor had not disclosed the cause



of pain. She had further stated that the place where she slept at the first visit, she had slept at that place on second visit. At both visit the doctor had seen her in the night as he used to see the patients in the night. In para-12, she had stated that while she was raped by the accused, her clothe was soaked with blood. She shouted out of pain. At para-13, she had stated that other patients were sleeping at the ground floor while the accused had taken her to the upper floor. She is unable to disclose the number of patients at the ground floor. None of the patients came at upper floor on her cry. At para-14, she had stated that compounder had come. Three persons had come whom she had disclosed regarding occurrence. In para-15, she had stated that blood had not fallen over the roof rather it was over the clothe. Her vagina became torn. No treatment was done for the same. Then thereafter, she had not cared to get her ailment treated furthermore.

23. In para-16, she had stated that the accused had committed rape thrice. Once at Patna and twice at her village. It might be on account of rape having at village, she had conceived. Then had detailed the event of rape having committed by the accused at the village. In para-17, she had stated that out of fear, she had not spoken to her family members as the accused had threatened her. She had denied the suggestion at para-18 that she had not gone to Patna with the appellant. She had further denied the suggestion that she along with her mother happen to be characterless. She has further denied the suggestion that due to indulgence in sexual activity with her



paramour, she became pregnant, as a result of which, she has begotten a daughter.

24. In *State of Himachal Pradesh v. Sanjay Kumar as reported in 2017 Cr.L.J. 1443*, the Hon'ble Apex Court has occasion to deal with the delay in institution of rape case as well as status of the victim inconsonance with the recognition of the evidence of the victim. For better appreciation the same is quoted hereinbelow:-

“24. When the matter is examined in the aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly understandable. We would like to extract the following passage from the judgment of this Court in *Tulshidas Kanolkar v. State of Goa*[(2003)8 SCC 590]:

“5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle.”

25. In *Karnel Singh v. State of Madhya Pradesh*[(1995) 5 SCC 518], this Court observed that: “7...The submission overlooks the fact that in India women



are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false..." 26. Likewise, in *State of Punjab v. Gurmit Singh & Ors.* [(1996) 2 SCC 384], it was observed: "8...The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged..."

27. In the same judgment the status of victim of rape as well as reliability of his evidence has properly been discussed under para-31 which is as follows:-

"After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a



crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See ***Bhupinder Sharma v. State of Himachal Pradesh*[(2003) 8 SCC 551]}**. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

25. Now coming to the facts of the case, it is admitted that appellant is not stranger to the family rather he happens to be Mamera Bhai of father of the victim and on account thereof, has got access in the family. Furthermore, the aforesaid event has been considered by the family members wherein the victim was entrusted to the appellant for having her treated at Patna. In likewise manner, the status of the victim being unmarried is also not under controversy. Further her pregnancy and giving birth to a female child subsequently, is also found duly acknowledged.

26. In likewise manner, happens to be status of the victim. Times without number the Hon’ble Apex Court had directed that the age of the victim could not be ascertained by way of medical evidence rather it should be in accordance with Rule 12 of the Juvenile Justice Act wherein age of the delinquent is being ascertained as held in ***Jernail Singh v. Haryana* 2013 Cr.L.J. 3976** as under para-20 which is as follows:-

“20. 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.

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 concerned child, 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 concerned child, on the basis of medical opinion.

27. In the case of *Mahadeo v. State of Maharashtra* as reported in (2013) 14 SCC 637 wherein it has been held as follows:-

11. Though the learned counsel for the appellant attempted to find fault with the said conclusion by making reference to the evidence of PW 8, the doctor, who examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years, it will have to be held that the rejection of the said submission even by the trial court was perfectly in order and justified. The trial court has found that to rely upon the said version of PW 8, the doctor, scientific examination of the prosecutrix such as ossification test to ascertain the exact age should have been conducted which was not done in the present case, therefore, merely based on the opinion of PW 8, the age of the prosecutrix could not be acted upon.

12. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice



(Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:

“12. (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, by 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;”

Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under Rules 12 (3) (a) (i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

13. In the light of our above reasoning , in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at



the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.

28. In *State of Madhya Pradesh v. Anoop Singh as reported in (2015) 7 SCC 773*, the same principle has also been followed by the Hon'ble Apex court as held in the case of *Mahadeo v. State of Maharashtra (supra)*.

29. In spite of the same, the age of the victim has been ascertained at the end of PW-12, the doctor, Gynaecologist without having assistance of Radiologist as well as other specialized wings. Contrary to it, her age is found properly disclosed to be as 16 years at the time of occurrence. Moreover, that has got no relevance in the background of the fact that neither it has been pleaded at the end of the appellant nor suggested that the victim was major and was a consenting party. In the aforesaid facts and circumstances of the case, two alternative options are left for proper consideration, whether there happens to be cogent reason for false implication. It is evident that inspite of having the witnesses declared hostile, appellant failed to draw that both the families were at the loggers head. Though in the Fard-e-beyan, some sort of discloser has been made which, during course of evidence, PW-1, the victim had left but surprisingly, neither her attention has been drawn towards the same nor there happens to be cross-examination at the end of the appellant on that very score. Suggestion has been brought up that the victim and her mother were



characterless which, from the mouth of some of the witnesses who were declared hostile, been brought up on record but again the same is not at all found properly placed as neither DW has been examined on that very score nor there happens to be specific assertion during course of statement recorded under Section 313 of the CrPC. Even being characterless, in absence of motive for false implication, it became highly improbable that the victim of rape will implicate other than the actual accused, who had ruined her by an act of rape that too, over an adolescent.

30. Contrary to it, even excluding the evidence of other PWs, the victim is consistent with regard to rape having committed upon her by the appellant and most surprising, during cross-examination, the victim has not been tested at least with regard to two incidents one while she was going with child and another when she was going to milk, during course of which she was dragged and raped in a husk room. She even not been cross-examined over location of husk room where she was raped at two different occasions.

31. In *Gian Chand & others v. State of Haryana* reported in 2013(4) PLJR 7 (SC) it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 observing as under:



“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)

32. The part which has not been challenged by way of cross-examination would tantamount to an admission. So far, non examination of mother is concerned, that has got no bearing as the defence could not be able to place the relevant material to suggest that on account of non-examination of mother of the victim, the prosecution case could not be accepted.



33. So far as non examination of Investigating Officer is concerned, really from the facts and circumstances of the case, it is apparent that it is not the defence rather the prosecution who has suffered in the background of the fact that majority of the witnesses had gone *volte face*. Furthermore, as the victim has not been cross-examined over rape having committed in the husk room, on account thereof, non examination of Investigating Officer, certainly could not cause prejudice to the accused.

34. Giving anxious consideration to the evidence available on the record, it is found and held that prosecution succeeded in substantiating its case and that being so, judgment of conviction and sentence recorded by the learned lower court is, hereby, affirmed. Appellant is on bail, hence his bail bond is cancelled directing him to surrender before the learned lower court to serve out remaining part of sentence failing which, the learned lower court will proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

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