

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.608 of 2015

Arising Out of PS.Case No. -380 Year- 2012 Thana -MOTIHARI TOWN District- EASTCHAMPARAN(MOTIHARI)

1. Jai Kumar @ Jai Prakash Son of Bhikhari Sah Resident of village- Areraj, P.S. Areraj, District- East Champaran

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 496 of 2015

Arising Out of PS.Case No. -380 Year- 2012 Thana -MOTIHARI TOWN District- EASTCHAMPARAN(MOTIHARI)

1. Muntzim Kamal S/o Jahid Hussain Resident of Mohalla Miscot, P.S. Motihari Town, District East Champaran.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 567 of 2015

Arising Out of PS.Case No. -380 Year- 2012 Thana -MOTIHARI TOWN District- EASTCHAMPARAN(MOTIHARI)

1. Vivek Kumar Son of Rajeev Kumar Resident of Mohalla - Bhawanipur Zirat P.S.-Chhatauni Dist,-East Chamaparan

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 520 of 2015

Arising Out of PS.Case No. -380 Year- 2012 Thana -MOTIHARI TOWN District- EASTCHAMPARAN(MOTIHARI)

1. Ravi Rai Son of Rambriksha Yadav, R/o Gyan Babu Chowk, Near SNS College, P.S. - Motihari Town, Motihari, East Champaran.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

Appearance :

(In CR. APP (SJ) No.608 of 2015)

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CR. APP (SJ) No.496 of 2015)

For the Appellant/s : Mr. Ansul, Advocate, Advocate



For the Respondent/s : Mr. S.A. Ahmad, APP
 (In CR. APP (SJ) No.567 + 520 of 2015)
 For the Appellant/s : Mr. Vibhuti Pandey, Sr. Advocate
 Mr. Pravin Kr. Sinha, Advocate
 For the Respondent/s : Mr. Sujeet Kr. Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT
Date: 20-06-2017

Criminal Appeal (SJ) No.608 of 2015 wherein Jai Kumar @ Jai Prakash is the appellant, Criminal Appeal (SJ) No.496 of 2015 wherein Muntzim Kamal is the appellant, Criminal Appeal (SJ) No.567 of 2015 wherein Vivek Kumar is the appellant and Criminal Appeal (SJ) No.520 of 2015 wherein Ravi Rai is the appellant originate against common judgment of conviction and sentence, on account thereof, have been heard together and are being disposed of by a common judgment.

2. All the above named appellants have been found guilty for an offence punishable under Sections 366A IPC and each one has been directed to undergo RI for 7 years, fine of Rs. 10,000/- and in default thereof, to undergo RI for six months additionally, under Section 363/34 IPC, for that also, each one has been directed to undergo RI for 7 years and to pay fine of Rs. 5000/- and in default thereof, to undergo RI for six months additionally, while appellant, Ravi Rai has additionally, been found guilty for an offence punishable under Sections 376 IPC and for that, he has been directed to undergo RI for 10 years and to pay a fine of Rs. 25,000/- and in default thereof, to undergo RI for six months additionally with a further



direction to run the sentences concurrently vide judgment of conviction dated 07.07.2015 and order of sentence dated 16.07.2015 passed by 1st Additional Sessions Judge, East Champaran, Motihari in Sessions Trial No. 235 of 2013/68 of 2014.

3. Succinctly, the case of the prosecution as comes out from the written report (Ext-2) filed by Usha Devi (PW 5) being accompanied by her husband, Krishna Agrawal (PW 1) on 06.09.2012 at about 5:00 PM disclosing therein that their daughter, (name withheld PW2) aged about 12 years while was in a way to school has been kidnapped on the same day, i.e. on 06.09.2012 at about 8:00 AM. After coming to know about the same, she along with her husband had gone in search of their daughter and during course thereof, they came to know that Ravi Rai son of Ram Briksh Rai, Vivek, Arzoo and Muntzim, in order to force their daughter to indulge in unwarranted activity or may sell her at Nepal under common intention hatching a conspiracy kidnapped her while she was in a way to school.

4. Town PS Case No. 380/2012 was registered under Sections 363 and 366A IPC. Whereupon investigation was taken up and during course thereof, the victim was recovered and after concluding the same, charge-sheet was submitted facilitating the trial which concluded in a manner, subject matter of these appeals.

5. The defence case as is evident from mode of cross-



examination as well as statement recorded under Section 313 CrPC is that of complete denial of the occurrence. Furthermore, mode of cross-examination and nature of suggestion given by the defence exposes the theme of consent which the victim was capable of on account of being major and to substantiate the same, they have also exhibited a letter by way of examining DW-1 as well as also brought up on record positive photographs.

6. In order to substantiate its case, the prosecution had examined altogether six PWs who are PW-1, Krishna Kumar Agrawal, father of the victim, PW-2 (name withheld), (victim), PW-3, Dr. Shakuntala Singh, PW-4, Dr. H. P. Thakur (another member of medical board), PW-5 Usha Devi, (informant) and PW-6, Jitendra Deo, Investigating Officer. Side by side, exhibited Ext-1, signature of Astha Kumari on the statement under Section 164 CrPC, Ext-2, Fard-e-beyan, Ext-3, Forwarding report, Ext-4 Seizure list, Ext-5, filed in defence evidence one page written in green ink, Ext-1/1 and ½ are age determination by medical officer, Ext-6 is report of medical board.

7. Defence had also examined one DW, Shambhu Prasad and had also exhibited A to A/16 (photos), Ext-B to B/1 are letters written by the victim.

8. All the appellants have independently argued their plea but are conjoint over drawing salient features coming out from the prosecution case which, as per their submission, happen to be



sufficient to demolish the case of the prosecution. They all consistently urged that prosecution had failed to bring reliable legal evidence with regard to status of victim PW-2 being a minor although, there happens to be disclosure that she was student of a school at the time of alleged occurrence. Neither the admission register has been made an exhibit nor birth certificate of the victim has been exhibited which, as argued, happens to be intentional one in order to pose the victim to be minor which, from the facts and circumstances of the case could not be, more particularly, in the background of evidence of PW 3 as well as PW 4 whereunder victim has been identified to be in between 15 to 16 years and having variance of two years plus minus, the victim happens to be major or at the verge of majority and that being so, her conduct is to be perceived in the aforesaid background. That being so, without raising hue and cry as well as taking any risk in getting her escape in spite of ample opportunity, the victim happily spared company of accused and so, it was neither a case of kidnapping nor of rape. Accordingly, finding recorded by the learned lower court happens to be rubecile and fit to be set aside.

9. Learned counsel for the appellant, Ravi Kumar has submitted that the prosecution case appears to be iridescent as well as improbable in the background of development having allowed by the prosecution during course of trial which completely twisted the initial version. It has been submitted that non happens to be an eyewitness to



the occurrence. Victim PW-2 was never kidnapped. She had gone along with appellant, Ravi Kumar on her own, enjoyed his company and then returned back. Subsequently thereof, having been influenced by the family members at the stake of family prestige, she fell under their toe whereunder she imagined fictitious story which she narrated in her statement under Section 164 CrPC as well as deposed the same during trial and that happens to be reason behind presence of so many ifs and buts smashing reliability of her Statement. In this way, learned counsel for the appellant, has drawn attention towards non examination of brother of the alleged victim who, according to her own version was present in the court where she along with Ravi had gone and further at her instance, her brother came, took her to parents and then to police station. What was the reason for non examination of brother is a circumstance which belie the narration of the victim because of the fact that had he been examined, he would have exposed whether the victim came at her place on her own or was accompanied by him from the court.

10. Apart from this, it has also been submitted that when the victim was being taken by away by the appellant, Ravi to the court where there was presence of large gathering, victim remained silent instead of raising her voice at least having been kidnapped without having theme of coercion or threat, had she not been a consented party, would not have projected in such appearance. Furthermore,



manner whereunder story of kidnapping has been flashed by the victim speaks a lot because of the fact that having ample opportunity to raise alarm, to take proper activity to slip from the clutches of the kidnappers, she relished their company without making any kind of protest in spite of absence of threat endangering her life during period of so called captive. From the evidence of victim, it is apparent that while she was being taken away towards Areraj, she had an opportunity to slip which she never opted. Therefore, considering the status of the victim inconsonance with her conduct, no offence under Section 363 IPC as well as 366A IPC is made out. .

11. Now coming to the finding of the learned lower court relating to Section 376 of the IPC, much emphasis has been drawn that the finding of the learned lower court is not at all found legal one in the background of the fact and circumstances of the case. While challenging the same, it has been submitted that from the evidence of PWs-3 and 4, it has become abundantly clear that so alleged victim happens to be a major one. During her examination-in-chief, she had categorically stated that at that very moment there was no force used upon her as well as in spite of access of an individual uninterruptedly as they were staying at a Hotel would not have allowed the appellant to overpower the alleged victim for the purpose of sexual exploitation unless and until, she was also desirous to indulge herself. That being so, no offence under Section 376 IPC is made out. Hence, the



judgment of conviction and sentence recorded by the learned trial court happens to be bad on account non application of judicious mind to the facts and circumstances of the case. Also cited **(2011) 13 SCC 459 (Jaya Mala v. Govt. of Jammu & Kashmir)** in support of the plea.

12. Learned counsel appearing for the appellant, Jai Kumar has submitted that he would not have been convicted by the learned lower court for an offence punishable under Sections 363 IPC as well as 366 A of the IPC in the background of the fact that appellant was not at all identified by the prosecution to be responsible for kidnapping of the alleged victim, as a result of which, his name does not find place in the written report. It has also been submitted that even considering the deposition of the victim, it is apparent that the appellant never indulged himself in any kind of activity prejudicial to her interest rather he had scolded the victim to go to her place while she came at his place where, she was not at all sheltered. Consequent thereupon, the finding of the learned trial court against the appellant could not survive. In an alternative, it has also been submitted that in worst case, his activity is perceivable in terms of Section 368 of the IPC and for that, considering his period of custody be allowed to saturate in terms of sentence if going to be recorded therefor. Also referred **(2015) 7 SCC 272 (Mohd. Ali @ Guddu v. State of Uttar Pradesh)**.



13. Learned counsels for the appellant, Vivek Kumar and Muntzim Kamal have submitted that they have fallen victim of circumstance. The initial version, Ext-2 suggests that neither the informant nor her husband were eyewitness of incident and so, identification of appellants at their end is not at all found in legal way. Furthermore, it has also been submitted that when the evidence of alleged victim, PW-2 is gone through, it is apparent that presence of these appellants have been brought up in sketchy manner which, considering the conduct of the victim, has purposely been introduced at the influence of her guardians to shield their prestige in the society which has maligned on account of own conduct of the victim by joining hands with appellant, Ravi Kumar and so, appellants are entitled for acquittal. That being so, in sum and substance, it happens to be the argument at the end of all the appellants that the judgment of conviction and sentence recorded by the learned trial court happens to be unsustainable in the eye of law and so, be set aside.

14. Learned APP while refuting the submissions made on behalf of respective appellants, has submitted that the conduct of victim happens to be natural in corollary with horrifying situation which she faced during commission of the occurrence. A minor premature girl, student of Class-8 would never perceive that being of such tender age, she is going to be victimized of lascivious desire of an accused who unexpectedly, pounced upon her, grabbed her without



giving an opportunity to think over the same and further carried her in such an illusive (tilasmi) manner and taken her to a place which was their ultimate destination properly affixed at the instance of appellant, Jai Kumar who facilitated their stay and during course thereof, victim was ultimately ravished by Ravi Kumar mercilessly. It has also been submitted that right from initial version, the prosecution had recognized identification of victim, being a minor and so, the defence could have cross-examined the witnesses including victim challenging the aforesaid status. Perhaps, that happens to be reason behind that the victim was not at all even suggested that she was a major and in the aforesaid background, the finding of the doctor is to be seen not allowing the estimate of age as plus two rather minus two corroborating the evidence of the parents of the victim. The cumulative effect manifestly suggests that the victim being minor was kidnapped and was ravished by Ravi during such condition, hence the learned lower court rightly convicted and sentenced. Furthermore, it has also been submitted that non examination of brother of the victim is not at all found adverse to the interest of prosecution in the facts and circumstances of the case.

15. After hearing rival submission, plea of prosecution and defence coupled with evidence available on the record, first of all, status of victim PW-2 is to be ascertained on account of being at centre point. As per evidence of PW-3, a Gynecologist who was also



one of the members of the Medical Board, which examined the victim PW-2 to ascertain her approximate age, under para-3 of her evidence deposited as follows:-

On the same day the same Medical Board has examined Astha Kumari (PW 2) for assessment of her age and found her height 4' 10", weight 41 Kgs, Genetania, developed, Teeth, upper-14, lower-14, pubic axillary, hair present, breast-developed. According to Radiological finding:- Epiphysis around elbow joint is present. Epiphysis around radius and ulna at the lower end not present. Epiphysis of iliac crest has appeared but not found.

Opinion:- Approximate age of Astha Kumar (PW 2) is between 15 years to 16 years.

16. During cross-examination at para-7, she had stated the age cannot be more than 16 years. In para-8, she had deposed that only on the basis of X-ray report and fusion of elbow joint the age was ascertained. In case of fused elbow joint, the age may increase up to 18 years.

17. PW-4 is another doctor who was one of the members of the Medical Board who examined the victim relating to her age under paras-2 and 3 which are as follows:-

2. Age determination was done by the Medical Board according to clinical findings. Height-m 4'10", Weight-41 Kgs, developed, Teeth, 14/14, pubic axillary, hair present, breast-developed. This report is



in my writing and signature which bears also the signature of Dr. Saroj Singh, Dr. Shakuntala Singh, Dr. Awadhesh Kumar and Dr. Nagmani Singh. I certified them which are marked as Ext-1/2.

18. In *Jaimala v. Govt of J.K. (1982)2 SCC 538*, it has been held that “*However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side*”

19. But subsequently, the said theme was disapproved by a three Judges Bench in *State of Karnataka v. Bantara Sudhakara* as reported in *(2008) 11 SCC 38* under para-12 which is as under:-

12. So far as the reasonings of the High Court are concerned they border on absurdity. All types of surmises and conjectures have been arrived at. Strangely, it was observed that PW16 the Head Master's evidence was to be discarded on the ground that the date of birth may not have been recorded on the basis of any medical certificate or other documentary evidence to show that these two girls were born on the date as mentioned. The High Court's conclusions in this regard are not only fallacious but contrary to the evidence on record. The High Court recorded a further finding that the two certificates may not relate to the victims though it specifically recorded that there was no such challenge raised by the accused. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation. There was no basis for coming to such a conclusion. In any event, the accused persons did not take the stand that there was any consent. On the contrary, they pleaded that they were falsely implicated. [In State of H.P. v. Shree Kant Shekari](#) [2004 (8) SCC 153] it was observed as follows:

"13. The factors which seem to have weighed with the High Court are (i) the age of the victim, which according to the High Court was more than 16 years; (ii) no evidence has been placed by the prosecution to show that



the victim had not consented to the act; and (iii) the time of alleged rape as given by the victim and her mother was improbabilised by the medical evidence. A particular reference was made to the fact that a child was born on 10.4.1979 and if the alleged rape has been committed during the period indicated by the victim and her mother the same would have been altogether different periods. The delay in lodging the first information report was also highlighted to attach vulnerability to the prosecution case.

14. We shall first deal with the question of age. The radiological test indicated age of the victim between 15 to 16½ years. The school records were produced to establish that her date of birth was 10.4.1979. The relevant documents are Ex.PW6/A to PW6/C. The High Court was of the view that these documents were not sufficient to establish age of the victim because there was another document Ex.PW7/A which according to the High Court did not relate to the victim. Merely because one document which was produced by the prosecution did not, according to the High Court relate to the victim that was not sufficient to ignore the evidentiary value of Ex.PW6/A to Ex.PW6/C. These were records regarding admission of the victim to the school and her period of study. These documents unerringly prove that the date of birth of the victim as per official records was 10.4.1979. Therefore, on the date of occurrence and even when the FIR was lodged on 20.11.1993 she was about 14 years of age. Therefore, the question of consent was really of no consequence.

15. Even otherwise the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It was not for the victim to show that there was no consent. Factually also the conclusion is erroneous right from the beginning that is from the stage when the FIR was lodged and in her evidence there was a categorical statement that the rape was forcibly done notwithstanding protest by the victim. The High Court was therefore wrong in putting burden on the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent. It is significant to note that during cross examination and the statement recorded under [Section 313](#) of the Code of Criminal Procedure, 1973 (in short the 'Code') plea of consent was not taken or pleaded. In fact in the statement under [Section 313](#) of the Code the plea was complete denial and false implication."



20. The said view has also been approved in the case of *Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh* reported in (2009)6 SCC 681 as well as in *State of U.P. v. Chhotey Lal* as reported in (2011) 2 SCC 550 and also in the case of *Dilip v. State of M.P.* as reported in (2013) 14 SCC 331 wherein it has been held under para-15 which is as follows:-

15. So far as the issue of determining the age is concerned, in the instant case Doctor has found that prosecutrix was having only 28 teeth, 14 in each jaw. Such an issue was considered by this Court in [Bishnudayal v. State of Bihar](#), AIR 1981 SC 39, wherein the court appreciated the evidence as under:

“8. The evidence with regard to the age of the girl was given by the prosecutrix (P.W.9), and her father. Jagarnath (P.W.4) and Dr. Asha Prasad (P.W. 14). P.W.9 and P.W.4 both stated that Sumitra (P.W.9) was 13-14 years of age at the time of occurrence. Dr. Asha Prasad opined that the girl was only 13 or 14 years of age on July 6, 1967 when the witness examined her. The Doctor based this opinion on physical facts, namely, that the examinee (P.W.9) had 28 teeth, 14 in each jaw, smooth pubic hair and axillary hair, which means the hair, according to the opinion of the Doctor, had just started appearing at the age of 14.” (Emphasis added)

A similar view has been reiterated by this Court while deciding Criminal Appeal No.1962 of 2010, [Kailash @ Tanti Banjara v. State of M.P.](#), vide judgment and order dated 10.4.2013, wherein relying upon several other factors for determining the age, this very Bench has taken a view that as the prosecutrix therein had only 28 teeth considering the other sexual character, she was only 14 years of age. Therefore, in view of the above, we do not find any fault with the finding recorded by the High Court so far as the issue of age is concerned.

21. In *Kailash @ Tanti Banjara v. State of M.P* as reported in (2013) 14 SCC 340, it has been held as under:-

9. Having heard learned counsel for the appellant as well as for the respondent, we are also convinced that the



submission of learned counsel for the State deserves to be accepted. The ascertainment of age has been done by the trial court concerned, by applying the various principles laid down by this Court. In this context, we refer to the decision of this Court in Vijay alias Chineer, (supra) and in which one of us (Hon'ble Chauhan, J.) was a party. We have held in paragraphs 27 to 30 as under:

“Determination of Age

27. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth- (Dental – Age)

28. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors	- 6th to 8th year
Lateral incisors	- 7th to 9th year
Canines	- 11th to 12th year
Second Molars	- 12th to 14th year
Third Molars or Wisdom Teeth	- 17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

Secondary Sex Characters

29. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

30. The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

i) Breasts and papilla are elevated as a small mound,



and there is enlargement of areolar diameter.

ii) More elevation and enlargement of breast and areola, but their contours are not separate.

iii) Areola and papilla project over the level of the breast.

iv) Adult stage – only the papilla projects and the areola merges with the general contour of the breast.

10. In the instant case, it will be worthwhile to refer to the version of P.W.2 Dr. Smt. Jasbit Kaur Saluja, who examined the victim P.W.4 and in her evidence has stated the physical features of the victim and observed as under:

“(3) Following was the condition of the girl observed on examination:-

Her height – 5”, weight – 43 Kgs., normal build, 13 teeth in the upper jaw and 14 in the lower jaw present, hair in armpit had not grown, breast was development, slight pubic hair were noticed.” Ultimately, she has opined in paragraph 14 and 17 that the victim appears to be 14 to 16 years.

11. The High Court in paragraph 9 again considered the said aspect of evidence of P.W.2 and noted as under:

“9. Accordingly, the margin or error could be ± 6 months. This apart, the radiological age, being probably, has to be verified in the face of age-related other evidence on record (State of H.P. V. Mange Ram AIR 2000 SC 2798 referred to). Viewing from this angle, the following physical features described by Dr. Jasbeer Kaur Saluja were sufficient to fortify her assessment that the prosecutrix was between 14 to 16 years of age:-

(i) Auxiliary hair not appeared.

ii) Public hair scanty.

iii) Menarche attained 1 year back.

iv) Teeth 7 + 6

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7 + 7

Considering these findings of anthropological and dental examinations, learned trial Judge did not commit any error in holding that age of the prosecutrix was about 14 years only ([See Bishnudayal v. State of Bihar](#) AIR 1981 SC 39).”

12. In paragraph 30 of the decision in Vijay alias Chinee,(supra), this Court has held by making specific reference to the growth of breast in a girl between the age group of 13 and 14 and has specifically referred to the extent at which such growth could be found, while in paragraph 28



based on the eruption of teeth, the age of a person can be ascertained. Again, in paragraph 29 this Court has noted the ascertainment of age based on the growth of pubic hair by which the age of the person can be scientifically arrived.

22. Now coming to the ocular evidence, it is evident that since inception of the case, the prosecution had disclosed in definite term ascertaining the age of the victim to be 12 years. While she was examined under Section 164 CrPC, she disclosed her age as 12 years. However, the Magistrate observed as 13 years. While PW-2 presented herself for evidence before the trial court, she disclosed her age as 14 years as well as estimated by the court as 14 years (30.01.2014). No documentary evidence has been adduced nor PW 6, the Investigating Officer cared to visit the school where PW 2 was studying and procured date of birth from the admission register. PW 1, her father in para-1 had stated that on the date of occurrence PW 2, the victim was aged about 12 years. In para-25, he had deposed that he had gone to St. Xavier's School for admission of victim. She was admitted in 2009. He had handed over the birth certificate issued by the municipality whereunder her date of birth happens to be 21/12/99. He had further stated that police had not accompanied him to school. He denied the suggestion that police had gone along with him to school to procure proof of date of birth but he managed whereunder certificate was not handed over to the police. He had further denied that he had prepared forged municipal certificate relating to date of birth of the



victim. In para-13, he had categorically stated that he was married on 23.04.1999 and the victim was begotten on 21.12.1999. PW-2, during her examination-in-chief had not specifically disclosed her age though, stated that she was school going student. During cross-examination, the defence had tested at para- 29 whereunder she had stated that at the time of occurrence she was school going student. When she was admitted in the aforesaid school, she is not remembering. Her date of birth happens to be 21.12.1999.

23. PW-5 is the mother. She during course of her examination-in-chief had specifically stated that at the time of occurrence, the victim was aged about 12 years. During cross-examination, at para-8 had stated that her daughter was aged about 12 years at the time of occurrence. Her date of birth happens to be 21.12.1999. She is not remembering whether admission register was seen by the police or not. Evidence of PW-6, the Investigating Officer is of no use on that score, as neither he on his own disclosed that he had gone to school to see the admission register to find out the date of birth nor he was cross-examined by the defence on that score. Furthermore, from the evidence of PW-1, PW2 and PW-5, it is crystal clear that they were half heartedly been cross-examined on that score. Moreover, no suggestion has been given to either of the PWs that PW-2, victim was major, and was capable to give consent.

24. Ascertainment of age of a victim on the basis of



ossification report have not been approved by the Hon'ble Apex Court and in lieu thereof, the procedure having been prescribed under Juvenile Justice (Care and Protection of Children) Act for ascertainment of age of juvenile has been approved. In *Mahadev v. State of Maharashtra* as reported in (2013) 14 SCC 637 under para- 11, 12 and 13, it has been held:-

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.

25. The aforesaid view has been reiterated by the Hon'ble Apex Court in subsequent judgment reported in **2013 CrLJ 3976 (Jernail Singh v. Haryana)** and **(2015) 7 SCC 773(State of Madhya Pradesh v. Anoop Singh)**.

26. The most significant event appearing from the evidences of the respective witnesses, more particularly, PW-1, father PW-2, the victim herself, PW-5, the mother along with statement recorded under Section 313 CrPC, it is apparent that none of the witnesses including that of victim has been suggested to be major and, being major she had joined hands along with accused, Ravi against



whom there happens to be allegation of rape and further, on that very score, her activity happens to be permissible in the eye of law being capable to give her consent as a result of which, the instant prosecution happens to be bad. Furthermore, it is also apparent from the cross-examination of PW-2 that defence on its own tested her but no sooner than having disclosure at her end 21.12.1999 to be her date of birth, changed the track. That means to say, the aforesaid disclosure is found uncontroverted at the end of defence and so, non production of documentary evidence is not going to discredit the prosecution version. Some sort of slackness has been found at the end of Investigating Officer who, in case, had properly cared, certainly would have got the relevant documentary evidence from the concerned school without any extra effort. Yelling of victim being ignored by the Investigating Officer in aptly manner is not unknown. In the case of *State of U.P. v. Chhote Lal (supra)* the Hon'ble Apex Court had occasion to perceive the same and shown its anguish over such conduct of the I.O. and for better appreciation the same is quoted below:-

36. We are constrained to observe that criminal justice system is not working in our country as it should. The police reforms have not taken place despite directions of this Court in the case of [Prakash Singh & Ors. vs. Union of India & Ors.](#)⁹. We do not intend to say anything more in this regard since matter is being dealt with separately by a 3-Judge Bench.
37. 37. The investigators hardly have professional orientation; they do not have



modern (2006) 8 SCC1 tools. On many occasions impartial investigation suffers because of political interference. The criminal trials are protracted because of non-appearance of official witnesses on time and the non-availability of the facilities for recording evidence by video conferencing. The public prosecutors have their limitations; the defence lawyers do not make themselves available and the court would be routinely informed about their pre-occupation with other matters; the courts remain overburdened with the briefs listed on the day and they do not have adequate infrastructure. The adjournments thus become routine; the casualty is justice. It is imperative that the criminal cases relating to offences against the State, corruption, dowry death, domestic violence, sexual assault, financial fraud and cyber crimes are fast tracked and decided in a fixed time frame, preferably, of three years including the appeal provisions. It is high time that immediate and urgent steps are taken in amending the procedural and other laws to achieve the above objectives. We must remember that a strong and efficient criminal justice system is a guarantee to the rule of law and vibrant civil society.

27. That being so, there remains no controversy with regard to status of the victim being minor falling in between age of 12-13 years on the date of occurrence and so, the anchor sheet of submission having been made on behalf of appellants that she was a consenting party became fragile. Even the issue of consent where victim happens to be the above age of 16 years became irrelevant as has been observed by the Hon'ble Apex Court in the case *Dilip v. State of M.P. (supra)* under paragraphs-16, 17, 18 and 19 which are



as follows:-

16. In case, the prosecutrix was below 16 years of age at the relevant time, the issue of consent becomes totally irrelevant. Even the issue of consent is no more res integra even in a case where the prosecutrix was above 16 years of age.

17. [In State of H.P. v. Mange Ram](#), AIR 2000 SC 2798, this Court, while dealing with the issue held:

"13. ... Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of [Section 375](#) requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (Emphasis added)

18. [In Uday v. State of Karnataka](#), AIR 2003 SC 1639, a similar view has been reiterated by this Court observing :

"21.....We are inclined to agree with this view that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. 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. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

19. [In Pradeep Kumar Verma v. State of Bihar & Anr](#), AIR 2007 SC 3059, this Court held as under:

"9.The crucial expression in [Section 375](#) which defines rape as against her will. It seems to connote that the offending act was despite resistance and opposition of the woman.

10. '17. The Penal Code does not define consent in positive terms. But what cannot be regarded as consent is explained by [Section 90](#) which reads as follows:

"18. consent given firstly under fear of injury and



secondly under a misconception of fact is not consent at all." That is what is explained in first part of [Section 90](#). There are two grounds specified in [Section 90](#) which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.

19. The factors set out in first part of [Section 90](#) are from the point of view of the victim and second part of [Section 90](#) enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of [Section 90](#) which is couched in negative terminology.

As observed by this Court in [Deelip Singh @ Dilip Kumar v. State of Bihar](#) (2005 (1) SCC 88), [Section 90](#) cannot be considered as an exhaustive definition of consent for the purposes of [IPC](#). The normal connotation and concept of consent is not intended to be excluded.

11. '21. In most of the decisions in which the meaning of the expression consent under the [IPC](#) was discussed, reference was made to the passages occurring in Strouds Judicial Dictionary, Jowitts Dictionary on English Law, Words and Phrases, Permanent Edn. and other legal dictionaries. Stroud defines consent "as an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". Jowitt, while employing the same language added the following:

"Consent supposes three things a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."

22. In Words and Phrases, Permanent Edn., Vol. 8-A, the following passages culled out from certain old decisions of the American courts are found:

"...adult females understanding of nature and



consequences of sexual act must be intelligent understanding to constitute consent."

Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent..."

28. In the background of aforesaid finding, the exaggeration as well as material contradiction visualizing in the evidence of PWs1 and 5 as submitted on behalf of appellants goes out of consideration as, the kidnapping of victim, a minor is out of controversy and further from the evidence of PW-2, victim though some sort of inclination is found consensual to the appellant but, her age inconsonance with her status did not allow to legally adopt a trend as well as acknowledgement. The evidence of PW-2 also substantiated the sexual activity having at the end of appellant, Ravi while she was under his captive and is also found corroborated by way of evidence through PW-3, the doctor who had examined the victim and categorically opined that she was sexually exploited.

29. After concluding the same, now it has been seen whether the finding recorded by the learned trial court happens to be sustainable in the eye of law. As stated above, all the appellants have been found guilty for an offence punishable under Sections 363 as well as 366A IPC and in addition thereto, Ravi Rai has been found guilty for an offence punishable under Section 376 IPC. For better appreciation Section 366A of the IPC is quoted below:-

“366A. Procurement of minor girl – Whoever, by



any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.”

30. After having minute consideration of requirement of Section 366A of the IPC relates with allowing indulgence of the victim under illicit intercourse with the other than the kidnappers. The same view has also been reiterated by the Hon’ble Apex Court in *Sat Prakash v. State of Haryana* as reported in (2015) 16 SCC 475 under para 5, 6 which are as follows:-

5. The charge with reference to [Section 366A](#) of the Indian Penal Code needs a closer examination. [Section 366A](#) of the Indian Penal Code is extracted hereunder:

“366A Procurement of minor girl – Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.”

6. A perusal of the aforesaid section reveals, that the inducing of the minor to constitute an offence under [Section 366A](#), should have been with reference to an intent to force or seduce her “... to illicit intercourse with another person...”. In fact, there is no mention of any other person in the sequence of allegations levelled against the appellant. In the above view of the matter, we are satisfied, that the charge under [Section 366A](#) was also not sustainable against the appellant. For the reasons recorded hereinabove, we are of the view, that the impugned order passed by the High Court convicting the appellant under [Section 366A](#) of the Indian Penal Code is also liable to be set aside. The same is accordingly hereby set aside.



31. Ravi Rai was himself one of the kidnappers who later on indulged himself in sexually exploiting the victim where upon, he could not be found guilty for an offence punishable under Sections 366A IPC. That being so, his conviction relating to Section 366A of the IPC is hereby, annulled maintaining his conviction and sentence relating to Section 363 IPC as well as 376 of the IPC.

32. Now coming to the remaining appellants, presence of appellant Jai Kumar @ Jai Prakash is not at all found during the whole exercise save and except Areraj and so, his case is to be dealt with separately. With regard to remaining two appellants, namely, Vivek Kumar and Muntzim Kamal, their presence happens to be since kidnapping of the victim, PW-2 who accompanied Ravi Rai, the main accused to Areraj where she was ravished and on account thereof, their conviction and sentence relating to 366A of the IPC is found in accordance with law, though their conviction and sentence under Section 363 IPC is found unwarranted and is, accordingly, set aside.

33. So far as appellant, Jai Kumar @ Jai Prakash is concerned, his activity is found duly identifiable from the evidence of PW-2, the victim as he provided clothe to the victim as well as also provided shelter to the victim along with Ravi Rai who were driven out therefrom after arrival of parents of Jai Kumar @ Jai Prakash. However, considering para 46 of her cross-examination wherein she had stated that Jai Kumar @ Jai Prakash had scolded her, and further



directed her to go to her parents, exposed his conduct and on account thereof, the conviction recorded against him, appears to be unsustainable. Hence, the same is set aside. Consequent thereupon, Cr. Appeal (SJ) No. 608/2015 is allowed. He is under custody, hence directed to be released forthwith, if not wanted in any other case.

34. In terms thereof, all the remaining three appeals i.e., Cr. Appeal (SJ) Nos. 496, 567 and 520 of 2015 are, hereby, dismissed.

(Aditya Kumar Trivedi, J)

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