

HIGH COURT OF CHHATTISGARH, BILASPUR

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Criminal Appeal No. 647 of 2002

Lalji

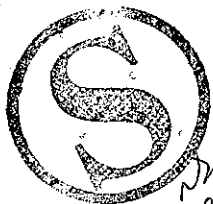
Versus

State of Chhattisgarh

C A V JUDGMENT

Post for pronouncement of judgment on 25/01/2018

Sd/-
Sharad Kumar Gupta
Judge



(34)

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HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 23-1-2018

Pronounced on 25-1-2018

CRIMINAL APPEAL No. 647/2002

Lalji S/o. Mantram Jaiswal aged about 25 years, R/o. Village Damapur,
Police Station Lalpur, Distt. Bilaspur (CG).

Versus

State of Chhattisgarh through Police Station Lalpur, Distt. Bilaspur (CG)

For appellant : Mr. H.S. Ahluwalia, Advocate.
For State : Ms. M. Asha, Panel Lawyer.

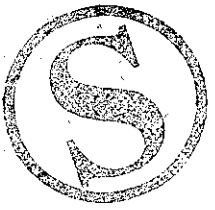
Hon'ble Mr. Sharad Kumar Gupta, Judge
C.A.V. JUDGMENT

1. In this criminal appeal, challenge is levied to the judgment of conviction and order of sentence dated 29-4-2002 passed by the Addl. Sessions Judge, Mungeli, Sessions Division Bilaspur, Distt. Bilaspur (CG) whereby and whereunder he convicted and sentenced the appellant as under:-

Under Section	Sentence	Fine	Default clause in payment of fine
363, IPC	2 years RI	Rs. 500/-	Additional 3 months RI
366 IPC	4 years RI	Rs.1,000/-	Additional 6 months RI
376(1) IPC	7 years RI	Rs.1,500/-	Additional 1 year RI

All the substantive jail sentences are directed to run concurrently.

2. This is admitted by the appellant that P.W. 2 Prosecutrix, P.W.3 Ramkumar Jaiswal, P.W. 4 Nainkali Bai, P.W. 5 Rajendra Kumar live at village Damapur. He is also neighbour of them.
3. In brief, prosecution story is that prosecutrix was 15 years old on 25-3-2000. On 25-3-2000 father of the prosecutrix P.W. 3



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Ramkumar Jaiswal and mother of the prosecutrix P.W. 4 Smt. Nainkali Bai had gone to their barn (Kothar) for doing work. Prosecutrix was present in the house. When Ramkumar Jaiswal and Nainkali Bai returned to their house at about 7.00 pm they found that prosecutrix was not present in the house. They searched for the prosecutrix but she could not be traced. During search they came to know that the appellant is also not present at the village. Ramkumar Jaiswal suspecting the appellant lodged FIR in PS Lalpur on 27-3-2000. During investigation, it was found that the appellant had kidnapped the prosecutrix and took her to Delhi and they resided there for about 3 months. He committed rape with the Prosecutrix in Delhi. The police officials took back the appellant and the prosecutrix from Delhi and handed over the prosecutrix to her father. After completion of the investigation, a charge sheet was filed against the appellant under Sections 363, 366 and 376 of the Indian Penal Code (in brevity 'IPC'). The trial Court framed the charges against the appellant under Section 363, 366 and 376(1) of the IPC. The appellant abjured the charges and faced trial. To bring home the charges, prosecution examined as many as 8 witnesses. The appellant has not examined any witness in his defence.

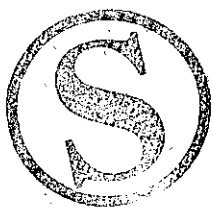
4. After conclusion of the trial, the trial Court convicted and sentenced the appellant as mentioned above. Being aggrieved, the appellant has preferred this criminal appeal.
5. Mr. Ahluwalia, counsel for the appellant vehemently argued that the prosecution has failed to prove that at the time of the first alleged incident, the prosecutrix was below 18 years of age.



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Materials available on record are sufficient to show that the prosecutrix was a consenting party. Thus the conviction and sentences of the appellant may be set aside and he may be acquitted from the aforesaid charges.

6. Ms. M. Asha, Panel Lawyer appearing for the State while supporting the impugned judgment submitted that conviction and sentences of the appellant are based on the cogent evidence adduced by the prosecution. Thus no interference is called for by this Court and the appeal deserves to be dismissed.
7. First point for consideration before this Court is as to what was the age of the prosecutrix on 25-3-2000.
8. P.W. 3 Ramkumar Jaiswal in paras 2 and 8 of his statement on oath given 15-1-2002 states that now a days, the prosecutrix is near about 17 years old. The prosecutrix was born in the month of Asarh.
9. P.W. 4 Smt. Nainkali Bai in para 1 of his statement on oath on 08-03-2002 says that the prosecutrix was aged 15 years, when she disappeared from their house.
10. P.W. 5 Rajendra Kumar who is brother of the prosecutrix in paras 1 and 3 of his statement on oath given on 8-3-2002 says that now the prosecutrix is about 17 years old. She was born in the year 1984.
11. As per alleged birth certificate Ex. P-1-A, the date of birth of the prosecutrix is 28-6-1984.
12. As per alleged MLC report Ex. P-11-A, P.W. 8 Dr. M.T. Minj had examined the prosecutrix and by her external examination

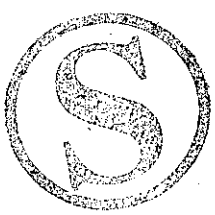


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observed her age as about 16 years old.

13. In **Netram Sahu v. State of C.G. {2012 (4) CGLJ 168}** the learned Single Judge of this Court has observed in para-8 as under:-

"8.....Now the next question to be decided by this Court is regarding the age of the prosecutrix at the relevant time. Neither the prosecutrix herself nor her mother has deposed about the date of birth of the prosecutrix. Mother of the prosecutrix has categorically stated that prosecutrix was born on 17th but she did not remember the month and year thereof as she was illiterate. She has further stated that when the child is born in the village, same is reported to the *Kotwal* and in the case of the prosecutrix also her date of birth was reported to him. According to her, birth certificate was being issued from the police station but in the case of prosecutrix no such certificate was issued. This witness has further stated that at the time of admission of the prosecutrix in the school, it is her father who had got her admitted and birth certificate issued by the Sarpanch was given in the school. She has further stated that she did not even remember the date of birth of her other two daughters. Govind Lal Chandravanshi (PW-7) - the Head Master of the school has stated that date of birth of the prosecutrix was recorded in the school register as 2.5.1997 and accordingly he issued the school certificate Ex.P-9. However, in the cross examination this witness has stated that at the time of admission of the prosecutrix whatever date of birth of the prosecutrix was disclosed by her guardian, same was recorded in the school register but on what basis it was recorded in the register it is not mentioned therein. He has further stated that it appeared to him that it was the mother of the prosecutrix who got her



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admitted in the school. Moreover, no ossification test has been done in this case and the age of the prosecutrix as 14 years recorded by the doctor (PW-9) has no basis. Doctor (PW-9) has fixed up the age of the prosecutrix as 14 years on the date of her medical examination. She has not stated as to on what basis she has recorded the same. The doctor (PW-9) did not conduct either the ossification test or any other pathological test to reach at least the proximate age of the victim and thus her assessment regarding age is based on fragile premises."

14. In **Sunil v. State of Haryana {2010 (1) SCC 742}** the Hon'ble Supreme court in para 24 observed as under:-

"24. Dr. Verma P.W.1, who had clinically examined the prosecutrix, found that her secondary sex characters were well developed. The short question in the facts and circumstances of this case remains to be determined is whether the prosecutrix was a minor? Dr. Sadhna Verma, PW1 who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by Dr. Sadhna Verma, PW1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix."

15. In **State of Madhya Pradesh v. Munna @ Shambhoo Nath** in Criminal Appeal No. 658 of 2011 decided on 18.09.2015 the Hon'ble Supreme Court has observed that the mother of the prosecutrix also was not able to give the exact age of the



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prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Further the Hon'ble Supreme Court has observed that to prove its case, the prosecution produced evidences including school certificate, opinion of the doctor who conducted medical examination of the prosecutrix, bone ossification test but since the doctor was not examined the High Court held that none of them could bring home the case of the prosecution. The prosecution produced school certificate of the prosecutrix and examined the Principal of Babu Manmohandas Hitkarini Girls Higher Secondary School, Dixitpura (PW1), where the prosecutrix studied in her 9th standard. In his cross-examination, PW1 stated that the age of the prosecutrix was noted at the time of admission but he had no knowledge about the fact as to what date of birth would have been mentioned in her letter of declaration. The examination-in-chief of PW8 (Dr. Nisha Sahu) does not support the prosecution story. In her opinion, the girl could not have attained the age of 14 years, but further in her examination-in-chief and cross-examination, she stated that she could not opine about the present intercourse. Other findings of PW8 are mere opinions and cannot be relied upon completely to establish the guilt of the accused.

16. The observation regarding age of the prosecutrix given by P.W. 8 Dr. M.T. Minj in Ex. P-11-A is not based on any scientific or medical test. It was merely given on the basis of physical



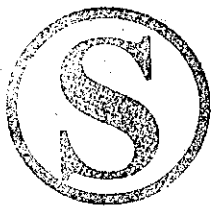
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examination. Moreover, as per advice given in Ex. P-11-A, the prosecutrix was not examined by the radiologist for confirming her age, nor she was examined by any dental surgeon to ascertain her age. For not doing so there is no reasonable explanation from the prosecution. Thus, looking to these circumstances and above mentioned judicial precedents, this Court finds that the prosecution does not get any help from aforesaid observation of PW-8 Dr. M.T. Minj and Ex.P-11-A in this reference that allegedly on 25-3-2000, the prosecutrix was below 18 years.

17. In **Subelal v. State of M.P. (Now C.G.) {2011(4) CGLJ 424}** the learned Single Judge of this Court has observed in paras- 9 and 10 as under :

"9. In *Alamelu and another Vs. State represented by Inspector of Police*, (2011) 2 SCC 385, the Supreme Court held that the transfer certificate which is issued by a government school and is duly signed by Headmaster would be admissible in evidence u/s 35 of the Evidence Act 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The Supreme Court held that – the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. In the present case, though PW-10 admitted to issue the transfer certificate (Ex.P/15) on the basis of entry in the school register, but the entry in the school register, by which, the prosecutrix was admitted in Class-6th, itself was not proved.

10. Ghirdharram Sahu (PW-11-father of the

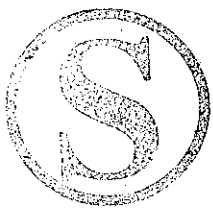


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prosecutrix) did not speak single word about making declaration relating to age of the prosecutrix even he has not deposed regarding the age of the prosecutrix on his personal knowledge. Puraian Bai (PW-9-mother of the prosecutrix) has also not deposed either about the age of the prosecutrix or that any declaration was made by them before the school authorities relating to age of the prosecutrix. Therefore, I am of the view that in such situation much reliance would not have been placed on the entries of the school register or the transfer certificate issued on the basis of such entry, for determining the age of the prosecutrix."

18. In **Rajkumar Bajaj @ Raja v. State of C.G. {2012 (4) CGLJ 437}** the learned Single Judge of this Court has observed in para-9 as under :-

"9. Minute examination of the evidence of the witnesses particularly that of the prosecutrix (PW-3), her parents (PW-1 and PW-2) and Laxmi Bai (PW-9) goes to show that she (prosecutrix) was a consenting party. Evidence further shows that the prosecutrix lived in the house of Dhaniram (PW-4) along with accused Raja for five days and used to go out for answering the call of nature and fetching water from the hand pump but during this long period she, in spite of having full opportunity, did not make any complaint to anyone about her being confined by the accused/appellant Raja. This conduct of the prosecutrix also makes it clear that she was consenting party to the act of accused/appellant Raja. Now the only question is regarding her age. Prosecution has filed photocopy of the *Kotwari* register (Ex. P-15-A) but event this document has not been proved by the prosecution in accordance with law. Original *Kotwari* register has not been produced in the Court by the prosecution nor there is any



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evidence to show as to on what basis the date of birth of the prosecutrix was entered in the said *Kotwari* register as 20.07.1980. Even the parents of the prosecutrix have not stated anything regarding the age of the prosecutrix. Moreover, the doctor (PW-8) who medically examined the prosecutrix has stated that she was a fully grown up woman. Though the record shows that prosecutrix was referred for x-ray for determination of age, there is no such report on record”

19. In **Birad Mal Singhvi v. Anand Purohit {AIR 1988 SC 1796}**

the Hon'ble Supreme Court observed in paras-14 and 15 as under:

“14.....If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents

15. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35



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of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

20. In Para- 22 of the judgment of the Supreme Court in **Babloo Pasi v. State of Jharkhand and Another {2008 AIR SCW 7332}**, it has been observed that :-

"22. Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

21. It would be manifest to refer para-25 of the judgment of the Supreme Court in **Sunil (supra)** which is extracted as under:-

"25. The prosecution also failed to produce any



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Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced."

22. P.W. 3 Ramkumar Jaiswal says in para 8 during his cross-examination that this is true that he had given the information to the Kotwar regarding the birth of the prosecutrix. P.W. 5 Rajendra Kumar says in para 3 during his cross-examination that from the information received from the Kotwar they came to know that prosecutrix was born in 1984. P.W. 7 Investigating Officer A.S.I. S.R. Bhagat says in para 13 given on oath that he had given Ex. P-1-A on the basis of the entries made in birth register kept in police station.
23. In the case in hand, the prosecution has failed to produce and prove the concerned register of the Kotwar wherein the date of birth of the prosecutrix has been mentioned allegedly as 28-6-1984. Moreover, P.W. 3 Ramkumar Jaiswal, P.W.4 Smt. Nainkali Bai, P.W. 4 Rajkumar do not say clearly and strongly that they had the special means of knowledge of the said date of birth of the prosecutrix which they had informed at the time of such entry to the concerned authority which has been written in the



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declaration form that could have been a main source of information for the date of birth of the prosecution. The prosecution failed to give plausible explanation as to why it was not done. Moreover prosecution has failed to examine the author of the entry of the date of birth of the prosecutrix in original birth register kept in the police station.

24. Looking to the above mentioned circumstances, judicial precedent laid down in **Munna @ Shambhoo Nath (Supra)** and the aforesaid judicial precedents, this Court finds that on the strength of Ex.P-1-A, it could not be said that at the time of the alleged first incident the prosecutrix was below 18 years.

25. In para 26 of the judgment in **Sunil (Supra)** the Hon'ble Supreme Court have further observed as under:-

"26. Bishan, PW8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date."

26. P.W. 2 Prosecutrix, P.W. 3 Ramkumar Jaiswal, P.W. 4 Smt. Nainkali Bai, P.W.5 Rajendra Kumar do not state clearly and strongly that what is the exact date of birth of the prosecutrix. P.W. 3 Ramkumar Jaiswal says in para 8 that he cannot say that in which month, year, prosecutrix was born. P.W. 5 Rajendra kumar says in para 3 that he does not know the date and the month regarding the birth of the prosecutrix. If the above



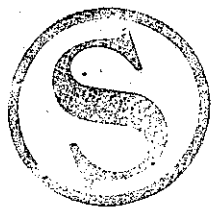
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mentioned circumstances, judicial precedents laid down in **Munna @ Shambhoo Nath (Supra)**, **Subelal (Supra)** and aforesaid judicial precedent are considered then this Court disbelieves said statements of para 2 and 8 of P.W. 3 Ramkumar Jaiswal, Para 1 of P.W. 4 Ramkali Bai, para 1 and 3 of P.W 5 Rajendra Kumar in this reference that allegedly on 25-3-2000 the prosecutrix was below 18 years.

27. Now the next question for consideration of this Court is that whether the appellant allegedly kidnapped the prosecutrix with an intent that she may be forced or seduced to illicit intercourse.
28. This has been earlier decided that prosecution failed to prove that on 25-3-2000, the prosecutrix was below 18 years.
29. Shri Ahluwalia, counsel for the appellant placed reliance in **S. Varadarajan -v- State of Madras** reported in 1965 (2) Cri.L.J. 33 in which it has been observed by Hon'ble Supreme Court in para-9 as under:-

"9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something



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more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

30. In **Subelal (supra)** in para-12 the learned Single Judge has observed as follows:-

"12. Now we shall examine the conduct of the prosecutrix. The case of the prosecution is that the prosecutrix accompanied the appellant and she went from village Zoratarai to village Bhakara on his bicycle. From Bhakara, they boarded a bus and went to Dhamtari. Further, from Dhamtari, they went to village Utai to the house of the sister of the appellant, they again boarded a mini bus and went to Bhilai (Power House). The appellant took the prosecutrix to the house of his other sister who was residing in Bhilai. The prosecutrix alleges that she was subjected to forcible sexual intercourse by the appellant in the house of his sister. Though the prosecutrix visited many places with the appellant, but she did not make any compliant and accompanied him in normal manner. This shows that she was not abducted and was not taken by force and she accompanied the appellant on her own will and it was not a case that the appellant committed sexual intercourse without her consent. Considering the evidence of age and conduct of the prosecutrix, I am of the view that the prosecutrix was a consenting party with the appellant and in the above facts and circumstances of the case, the offences u/ss 363, 366 & 376 Indian Penal Code would not be made out against the appellant. "

31. In **Sheikh Shariff v. State of Chhattisgarh {ILR 2017 Chhattisgarh 1317}** the learned Single Judge in para-18 has observed as follows :-



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"18. Now coming to the other Sections 363 and 366 of I.P.C., the statement of the prosecutrix (P.W.-1) are examined in between the lines, major contradictions appears in the Court statement. It was stated that she was administered with intoxicated substance thereafter, she was not in know of any fact that what happened. Further taking into the other documents, which are on record, which would show that she was recovered at Mominpara, Raipur from the custody of the appellant after about 10 days of incident. The evidence is also on record, the prosecutrix remained in custody from date of disappearance from 22.02.2012 to 05.03.012 i.e. about two weeks. The statement would further show that she traveled from different place in the company of appellant and these facts remained unexplained."

32. P.W. 2 the prosecutrix in paras 2, 7, 9 and 11 says that at the time of alleged first incident, she had gone for defecation towards appellant's house. The appellant had promised her that he will marry her. This is true that the appellant was already married before she and the appellant had gone to Delhi. The appellant was keeping her well like his wife. This is also true that there was love relationship between them. They had gone to village Kanteli by walking. They went from Kanteli to Lormi by bus. They stayed in a school at Lormi. She had not told anyone that the appellant is taking her to Delhi. Then they went to Kota by bus. In Delhi there were so many huts near the hut where they resided. She had not told to anyone at Delhi that the appellant had committed bad acts with her. When appellant committed bad acts, she did not stop him. During residing in Delhi for 3 months she never complained to anyone that the appellant had kidnapped her.



33. Looking to the above mentioned circumstances, the judicial precedent laid down in **Rajkumar Bajaj (Supra)** and the aforesaid judicial precedents, this Court finds that the prosecutrix was a consenting party.
34. After the appreciation of the evidence, this Court finds that the prosecution has failed to prove beyond reasonable doubt that the appellant had taken away the prosecutrix, who was allegedly below 18 years, out of the keeping of her lawful guardian Ramkumar Jaiswal, without the consent of him, with an intent that she may be forced or seduced to illicit intercourse and also raped her.
35. Looking to the facts, circumstances and materials of the case this Court finds that the Trial Court has committed gross mistake in convicting and sentencing the appellant as aforesaid.
36. After the complete and full appreciation of the evidence, this Court allows the appeal and sets aside the impugned judgment of conviction and order of sentence dated 29-4-2002 of the trial Court and acquits the appellant from the charges under Section 363, 366, 376(1) IPC extending the benefit of doubt.
37. The appellant is on bail. The bail bond of the appellant stands discharged subject to the provisions contained in Section 437-A of the Cr.P.C.

Sd/-
Sharad Kumar Gupta
Judge