

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.666 of 2015**

Arising Out of PS. Case No.-196 Year-2012 Thana- MADHEPURA District- Madhepura

Mahendra Ram Son of Sukhdev Ram Resident of village - Dakti Ghat, Police
Station - Supaul, District - Supaul

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Pankaj Kumar Jha, Adv
For the Respondent/s : Mr.Bipin Kumar, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

25-09-2019

Appellant, Mahendra Ram has been found guilty for an offence punishable under Section 366A/34 IPC and sentenced to undergo RI for 6 years as well as to pay fine appertaining to Rs. 6000/- in default thereof, to undergo SI for six months additionally, under Section 376 IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 20,000/- in default thereof, to undergo SI for one year with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial will be set off in accordance with Section 428 CrPC vide judgment of conviction dated 17.06.2015 and order of sentence dated 25.06.2015 passed by ^{2nd} Additional Sessions Judge, Madhepura in Sessions Trial No. 185A/2012 arising out of Madhepura (Dhailarh) PS Case No. 196/2012.



2. Arjun Sah (PW 2) filed written report on 03.05.2012 alleging therein that Mahendra Ram whose Sasural lies in his village and happens to be brother-in-law of his co-villager, Lal Bahadur Ram used to exercise exorcism for treating the people. On that very score, he treated his daughter (name withheld, PW-8 aged about 15 years) who was suffering from ailment since before and was being treated otherwise. It has further been disclosed that on 25.04.2012 at about 4:00 PM, the aforesaid Mahendra Ram enticed away the victim and in spite of hectic search at their end, failed to locate. Wife of Lal Bahadur Ram, namely, Sangyan Devi and Ranju Devi, both had assisted during course of commission of the crime.

3. From the record, it is evident that during course of investigation, Ranju Devi and Sangyan Devi, both were apprehended and so, before expiry of the statutory period of ninety days, they were charge-sheeted keeping the investigation pending against the appellant who was subsequently, apprehended along with the victim at Madras wherefrom they were brought, victim was examined under Section 164 CrPC, was medically examined and then after concluding the investigation, charge-sheet was submitted, facilitating the trial, meeting with the ultimate result, subject matter of the instant



appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that the victim was major and she on her own volition accompanied the appellant, availed his company, projected herself to be his spouse and after having been emotionally overpowered by her family members, giving a wrong and fictitious date of occurrence, got his case filed. However, nothing has been adduced in defence.

5. In order to substantiate its case, the prosecution has examined altogether fourteen PWs who are PW-1, Sudhir Kumar Sah, PW-2, Arjun Sah, PW-3, Ramnandan Sah, PW-4, Ram Lakhan Sah, PW-5, Mithilesh Sah, PW-6, Shyam Yadav, PW-7, Krishnadeo Sah, PW-8, Victim, PW-9, Avinash Kumar, PW-10, Sudama Rai, PW-11, Bodhan Rai, PW-12, Dr. Ashok Kumar Verma, PW-13, Dr. B.K. Gupta, PW-14, Dr. Ranjan Kumari. Side by side, has also exhibited Ext-1, Signature of informant on the formal FIR, Ext-2, Statement of victim under Section 164, Ext-3, Writing and signature of Judicial officer on the Statement of victim under Section 164, Ext-4, Writing and signature of the then Police officer, Ran Vijay Singh on the formal FIR, Ext-5, Signature of Police Officer, Ajay Kumar on



the written statement, Ext-6, Signature of Police Officer, Ajay Kumar on the formal FIR, Ext-8, Signature of Dr. B.K. Gupta on medical report, Ext-8/1, Signature of Dr. A.K. Verma on medical report, Ext-8/2, Signature of Dr. Parshuram Prasad on Medical Report, Ext-8/3, Signature of Dr. Ranjana Kumari on Medical Report, Ext-9, Writing and signature of Dr. Ranjana Kumari on Medical Report. As stated above, nothing has been adduced in defence.

6. It has been submitted at the end of the learned counsel for the appellant that from the evidence, it is apparent that victim was a consenting party. To substantiate such plea, drew attention towards evidence of PW-2, father of the victim who had gone to Madras and when they arrived at the place of the victim, he had stated that at that very time, appellant was taking meal while victim was drenching water. It is also evident from his evidence that near about 50 houses lie in the surrounding and, had there been some sort of criminal activity or even distractedness in between, then in that event, right from the village to Madras via Delhi would not have occurred so smoothly, that too enjoying the company for four months without any hitch and hindrance. Then it has been submitted that the victim was major, although, there happens to be no



suggestion given to the victim but from the evidence available on the record, it is evident that victim was major and to justify the same drew attention towards the medical evidence whereunder age of the victim has been traced out in between 14-14 having variance plus minus two years. So, she was aged about 16-18.

7. After Amendment of Section 376 IPC in the year 2013, the age has been enhanced from 16 to 18 but prior thereto, the consenting age was that of 16 years which the victim had crossed and the same is also testified from the evidence of PW-5. So, it has been submitted that victim was major and a consenting party, therefore, no offence under any of the provisions of law whereunder convicted is made out. That being so, it is a fit case whereunder judgment of conviction and order of sentence recorded by the learned lower court should be set aside.

8. On the other hand, learned APP supporting the finding recorded by the learned lower court, has submitted that from the evidence available on the record, it is evident that the finding so recorded by the learned lower court does not attract interference as the same has been delivered after meticulous examination of the materials available on the record. Hence,



appeal be dismissed.

9. Learned counsel for the appellant is right in arguing that the manner whereunder the victim, PW 8 has deposed, indicates otherwise because of the fact that the journey which she covered would not have materialized, had there been any kind of resistance/protest/unwillingness at the end of the victim. Furthermore, from the evidence of PW-2, father, the relevant para-15 whereunder, he has stated that Mahendra Ram was a mason at Madras. He was engaged in construction of a new college. In para-16, he has stated that his daughter used to go for menial work. Both of them shared their earnings and then spent it at their livelihood. But, the sole question is whether the victim was minor or major. The occurrence is of dated 25.04.2012 on which date the old Section was prevailing whereunder 16 years of age was the age of consent.

10. The medical examination report, Ext-7, 8, 8/1, 8/2, 8/3 and 9 supported by PWs-11, 12 and 13 speak about assessment of age of the victim in between 14-16 years. It is needless to say that the Hon'ble Supreme Court times without number has deprecated the assessment of age of the victim on the basis of ossification, rather it should be by adopting the procedure so prescribed for ascertainment of age of Juvenile as



provided under I.I. (C.P.) Act.

In the case of **Jernail Singh v. Haryana 2013 Cr.L.J. 3976** as reported in **2013 Cr.L.J** it has been held:-

“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.

11. 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.

12. In State of *Madhya Pradesh vs. Anoop Singh* as



reported in (2015) 7 SCC 773, it has been held as follows:-

“ 12. This Court in the case of Mahadeo S/o. Kerba Maske v. State of Maharashtra and Anr. : (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

Rule 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, 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.

13. This Court further held in paragraph 12



of Mahadeo S/o. Kerba Maske (supra) as under:

Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described Under Rule 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 the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.

13. That being so, irrespective of age so assessed at the end of medical board so constituted having presence of PWs-11, 12, 13, as members, does not inspire confidence as being in contravention of direction of the Hon'ble Apex Court which, under Article 142 of the Constitution of India happens to be binding upon all concerned.

14. Apart from this, from the evidence of PW-2, para-6 on court's question disclosed age of victim on the dated of occurrence to be 15 years found duly corroborated under para-23 whereunder he has stated that his eldest son is engaged in agriculture. He had studied up to Class-8. Victim also up to Class-8 and the youngest son is reading in Class-7. There happens to be no cross-examination to the I.O, PW-10 that during course of investigation whether he had gone to school to search out the date of birth of the victim. The most surprising feature is that the victim has not been even suggested that she happens to be a minor. Though PW-2 under para-19 has been



cross-examined whereunder he has stated that he was married in the year 1984. The eldest son Sudhir was born after seven years of marriage. The victim was begotten six years thereafter, that is to say, 13 years after marriage and the youngest one came in the year 1999. So, the victim was begotten in the year 1997 and so, was aged about 15 years on the date of occurrence.

15. The learned counsel for the appellant drew attention towards the evidence of PW-5 on this score and referred para-8 whereunder, he has disclosed his date of birth as 18.09.1985. Then drew attention towards para-7, wherein, he has stated that Sudhir is two years younger than him and the victim is also younger to him. She is one year younger to Sudhir. Whether his evidence is reliable in comparison to the evidence of PW-2 that too when there happens to be averment since initial stage that the victim was aged about 15 years and that too when under para-11, (PW 5) he had admitted that his house and house of Arjun happens to be separate intervened by one house. In the aforesaid background, the identity of the victim to be major became non reliable and so, is found and held below the age of 16 years at the time of occurrence and so consent has got no legal recognition.

16. Then it has been submitted that the instant case



should not have been investigated and tried because of the fact that from the evidence of PW-2, it is apparent that while he had gone to Madras, he had gone to the police and police recorded his statement and then thereafter, police had gone to the place where the victim as well as the appellant were residing and in the aforesaid background, as per evidence of PW-10, he had not gone to Madras to see the version of the victim, led the instant prosecution illegal and so, the finding so recorded by the learned lower court would not sustain. In order to search out the same deposition of PW-2 has thoroughly gone through. From para-11, PW-2 has stated that after reaching at Madras, first of all, he had gone to the police but he is unable to disclose his designation as well as name of the police station as the same was not in Hindi script. In para-12, he has stated that the victim was recovered after covering two kilometre distance from the police station. In para-18, he has stated that police had not seized any article from the place where accused was apprehended. Just after arrest of the accused, recovery of the victim, they had gone to the station. Accused was handcuffed. He also came along with police. They have come by Chennai Express. Then had disclosed that police after getting the accused and his daughter boarded on the train, returned back. At that



very time, police had not given any paper but, had taken his signature. In the midst of way at Katihar, Mahendra tried to flee but his effort was frustrated by him. Then they came to Sialdah and then from Kolkata to Katihar by bus and from Katihar to Purnia by bus and then from Purnia to Baijnathpur and from Baijnathpur to police station on motorcycle. In para-24, he has stated that he had submitted written report before the police which was ascribed by Munshi of Police Station. After 2-3 days after filing of written report, he had made statement before the police. He is not remembering whether the police had taken his signature or not.

17. So, from the evidence of PW-2, it is evident that whatever been submitted at the end of the learned counsel for the appellant is not at all visible from the evidence of the PW-2 and so, the submission having at the end of learned counsel for the appellant that there was institution of a case at the end of PW-2 before the police of Madras, is not at all found true. From the lower court records, it is found that appellant was produced before the learned lower court on 12.09.2012. From the evidence of PW-10, I.O, it is evident that accused, Mahendra Ram and the victim were produced by the PW-2 (para 2) of the examination-in-chief and, on that very score, there happens to



be no cross-examination. As such, the submission having been made on behalf of learned counsel for the appellant, is found non appreciable.

18. Now coming to the question of sentence. Less said is better. It is needless to say that the appellant is a married man. He has disclosed his age 50 years at the time of statement. The victim was below the age of 16 years and then alluring her, only to satisfy his lust, he spoiled life of the victim, whereupon, needs no sympathetic approach.

19. After considering, analyzing evidence as discussed hereinabove, the appeal is found deficient one. Consequent thereupon, the same is dismissed. Appellant is under custody which he shall remain till the saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

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