

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2810 of 1999

Judgment Reserved on : 20.1.2021

Judgment Delivered on : 22.2.2021

Sarju Sahu, Aged 20 years, Son of Gayaram Sahu, By Occupation Grazier,
Resident of Village Dayalpur, Police Station Nandghat, District Durg, M.P.
(now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh)

--- Respondent

For Appellant	: Shri V.K. Pandey and Shri Shobhit Koshta, Advocates
For Respondent/State	: Shri Ghanshyam Patel, Government Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment dated 30.9.1999 passed by the Additional Sessions Judge, Bemetara, District Durg in Sessions Trial No.189 of 1998 convicting and sentencing the Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 1 year and fine of Rs.100/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.200/- with default stipulation
Under Section 376(1) of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.500/- with default stipulation

	Sentences are directed to run concurrently
--	--

2. According to the case of prosecution, at the time of incident, age of the prosecutrix (PW1) was about 14 years. On 25.2.1998 at about 5 p.m., when the prosecutrix was going towards a nala (drainage) of her village and when she reached near the house of the Appellant, at that time, the Appellant along with co-accused Kamlabai (acquitted) came out of his house and they caught the prosecutrix. The prosecutrix tried to scream. It is alleged that she was taken inside the house and thereafter she was threatened. Thereafter both the accused persons bolted the door of the house and went out. At about 8 p.m., the Appellant returned home and thereafter he committed five times forcible sexual intercourse with the prosecutrix during that night. Thereafter, on 27.2.1998, the matter was reported by the prosecutrix vide First Information Report (Ex.P18). She was medically examined by Dr. Mamta Pandey (PW3). Her report is Ex.P1. To determine age of the prosecutrix, her ossification test was conducted by Dr. G.S. Thakur (PW10). His report is Ex.P23 in which he opined that at the time of examination, age of the prosecutrix was about 14 years. Statements of the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed. The Trial Court framed charges against the accused persons.
3. To bring home the offence, the prosecution examined as many as 10 witnesses. Statement of the accused persons were also

recorded under Section 313 of the Cr.P.C. in which they denied the guilt, pleaded innocence and false implication. No witness has been examined in their defence.

4. On completion of the trial, the Trial Court acquitted co-accused Kamlabai of all the charges, but convicted and sentenced the Appellant as mentioned in 1st paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that without there being any clinching and sufficient evidence on record, the Trial Court has wrongly convicted the Appellant. Referring to the statement of the prosecutrix (PW1) and her maternal grandfather Sukhdas (PW2), it was argued that after the incident, the prosecutrix did not tell anything about the incident to anyone. Next day, after coming out of the house of the Appellant, she straightway went to an agricultural field. Even thereafter, she did not make any complaint to anyone. At the time also when the Appellant was taking the prosecutrix to his house, she did not raise any alarm. When the Appellant bolted her inside his house and went out of the house for about 3-4 hours, at that time also, she did not raise any voice and did not try to run out of the house. The above conduct of the prosecutrix shows that she was a consenting party. It was further submitted that there is no documentary evidence available on record with regard to age of the prosecutrix. Both the prosecutrix and her maternal grandfather Sukhdas were unable to state date of birth of the prosecutrix. According to the ossification

test report (Ex.P23), age of the prosecutrix was about 14 years. Radiologist Dr. G.S. Thakur (PW10) has admitted the fact that there could be error of 3 years on either side in determination of age of the prosecutrix. Therefore, there is no conclusive evidence on record on the basis of which it could be said that the prosecutrix was below 16 years of age. Thus, the conviction of the Appellant is not sustainable.

6. On the contrary, Learned Counsel appearing for the State opposed the submissions put-forth on behalf of the Appellant and supported the impugned judgment. Referring to the judgment of the Supreme Court in **Jarnail Singh v. State of Haryana, (2013) 7 SCC 263**, it was argued that in the instant case with regard to age of the prosecutrix/victim girl, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (henceforth 'the Rules, 2007') shall be applicable. In this case, no documentary evidence is available with regard to date of birth of the prosecutrix. Regarding her age, only the ossification test report is available on record. Further referring to clause (b) of Rule 12(3) of the Rules, 2007, it was argued that in this circumstance, age of the prosecutrix should be considered on lower side within the margin of one year. Hence, it was submitted by Learned State Counsel that the Trial Court has rightly arrived at the conclusion that the prosecutrix was below 16 years of age.
7. I have heard Learned Counsel appearing for the parties and perused the material available on record including the statements

of the witnesses with utmost circumspection.

8. First, I shall take up and consider the issue of age of the prosecutrix. In **Jarnail Singh (supra)**, it has been observed by the Supreme Court thus:

“23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be

treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

9. Thus, in the instant case, it is clear that for determination of age of the prosecutrix, Rule 12 of the Rules, 2007 is applicable. Rule 12 of the Rules, 2007 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 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 7-A, 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 of 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.”

10. In this case, both the prosecutrix (PW1) and her maternal grandfather Sukhdas (PW2) have not been able to state exact date of birth of the prosecutrix. There is no documentary evidence available on record regarding any entry of her date of birth. Only the ossification test report (Ex.P23) given by Radiologist Dr. G.S.

Thakur (PW10) is available on record in which he has opined that at the time of examination of the prosecutrix her age was about 14 years. He has further opined that this is her estimated age and there can be margin of error of 3 years on either side. The argument advanced by Learned State Counsel that according to clause (b) of Rule 12(3) of the Rules, 2007 age of the prosecutrix should be taken on lower side within the margin of one year, has, in my considered view, no substance because no medical board, as provided in the said clause (b), was constituted in the instant case for determination of age of the prosecutrix. In this case, only the ossification test report (Ex.P23) is available for determination of age of the prosecutrix. It is a settled position of law that an ossification test report is not a conclusive evidence for determination of age of a victim girl/prosecutrix and margin of error in the age determined by a Radiologist is 2 to 3 years on either side and it is also a settled position of law that benefit of doubt goes in favour of the accused.

11. Looking to the above, in my considered view, the prosecution has not been able to establish that at the time of incident the prosecutrix was below 16 years of age.
12. Now, I shall examine the conduct of the prosecutrix. According to the Court statement of the prosecutrix (PW1), on the date of alleged incident, the Appellant and acquitted co-accused Kamlabai had caught the prosecutrix near a nala (drainage) of the village and taken her to the house of the Appellant. Thereafter, the Appellant had kept the prosecutrix at his house for the whole night and

committed sexual intercourse with her five times in the night. Next day, in the morning at about 8-9 a.m., the Appellant expelled her out saying her to go away. She came out of his house, but did not tell anything about the incident to anyone and she directly went to an agricultural field to work. In the evening, after her return to her house, she told about the incident to her maternal grandfather Sukhdas (PW2). During cross-examination, in paragraph 6, she has admitted that at the time of incident, the Appellant was alone at his house and other members of his family had gone out to see a fair. In paragraph 10, she has further admitted that at about 5 p.m., the Appellant had locked his house and gone out and thereafter he had returned at about 8 p.m., but during this period of about 3 hours, she did not raise a voice to come out of his clutches. She has further stated in paragraph 7 that in the night after committing five times sexual intercourse with her, he had slept and thereafter he had waken up in the morning. When he was sleeping, during that period also, she did not raise a voice nor did she try to flee from his house. She has further admitted in paragraph 8 that in the morning at about 8-9 a.m., her maternal grandfather Sukhdas (PW2) had come to the house of the Appellant and he had asked the grandfather of the Appellant to send her to her house. Thereafter, she was sent out of the house by the grandfather of the Appellant.

13. Sukhdas (PW2), maternal grandfather of the prosecutrix, in his Court statement, has deposed that in the night when the prosecutrix did not return, he got into a suspicion that she would be

in the house of the Appellant. On being asked by this witness, one Shivprasad went to the house of the Appellant and saw there that the prosecutrix was present inside the house of the Appellant. Thereafter, this witness himself went to the house of the Appellant, but the prosecutrix did not come out of the house. Thereafter, she returned home in the evening and told this witness about the incident.

14. Dr. Mamta Pandey (PW3), who examined the prosecutrix and gave her report (Ex.P1), has deposed that hymen of the prosecutrix was absent, no sign of recent intercourse was found and no injury was found in the private part nor was found over any other part of the body. She also did not find any bleeding or discharge from the private part.
15. On a minute examination of the above evidence adduced by the prosecution, it is clear that the prosecutrix stayed at the house of the Appellant for the whole night. During that night, when the Appellant went out of his house for about 3 hours, during that period, she did not raise a voice nor did she try to flee from the house. In the night, after committing sexual intercourse with her, when the Appellant was sleeping, during that period also, she did not raise a voice nor did she try to run out of the house. In the next morning, grandfather of the Appellant sent her out of the house. At that time also, she did not make any complaint against the alleged incident and she went to an agricultural field to work. In the evening, when she returned home, she, for the first time, made

complaint against the incident to her maternal grandfather Sukhdas (PW2). Even no injury was found in her private part or over any other part of her body in her medical examination. The entire conduct of the prosecutrix shows that she was a consenting party. She stayed at the house of the Appellant at her own will. At the time of incident, her age was below 16 years is not proved beyond reasonable doubt. Since she was a consenting party and she stayed at the house of the Appellant at her own will, no offence is made out against the Appellant and looking to the evidence adduced by the prosecution the Appellant is entitled to get benefit of doubt. Thus, the conviction of the Appellant is not sustainable.

16. Consequently, the appeal is allowed. The judgment under challenge is set aside. The Appellant is acquitted of the charges framed against him.

Sd/-
(Arvind Singh Chandel)
JUDGE