

**ABC 2015 (II) 332 SC
ACQUITTAL & BAIL CASES
SUPREME COURT OF INDIA**

(Pinaki Chandra Ghose & R.K. Agrawal, JJ)

Criminal Appeal No. 658 of 2011

(From Madhya Pradesh High Court)

Decided on 18 September, 2015

STATE OF MADHYA PRADESH

- Appellant(s).

Versus

MUNNA @ SHAMBHOO NATH

- Respondent(s).

Law Covered:-

(A) Indian Penal Code, 1860 — Section 376 — Appeal against acquittal — Age of prosecutrix — Doctor who conducted Ossification Test X-ray — not examined — report is not sufficient to prove the age of the girl — the mother of the prosecutrix also was not able to give the exact age of the prosecutrix — No question was asked to the prosecutrix by the prosecution about her age — Held, 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 — Acquittal upheld. (Para 9)

(B) Indian Evidence Act, 1872 — Section 8 — Conduct of witness — Evidence of prosecutrix — she was sleeping between her mother and brother and the accused had reached her after hopping over them and he dragged her into another room on the point of a knife — Held, sneaking in with such ease is highly doubtful. (Para 6)

(C) Criminal trial — Weapon used in commission of crime — non-recovery of — fatal to prosecution. (Para 6)

(D) Indian Penal Code, 1860 — Section 376 — Indian Evidence Act, 1872 — Section 8 — Conduct of prosecutrix — Accused & the prosecutrix remained in the room for couple of hours — prosecutrix was found in the room with the accused, hiding behind the bags when her mother and elder sister came searching for her — Held, prosecutrix was a consenting party. (Para 6)

(E) Indian Evidence Act, 1872 — Section 45 — Opinion of expert — non examination — effect of — From the X-ray report of the ossification test, the doctor opined that the age of the prosecutrix could not be more than 14 years — doctor not examined — the X-ray report is not sufficient to prove the age of the prosecutrix. (Para 9)

(F) Indian Evidence Act, 1872 — Section 35— Relevancy of entry in public record made in performance of duty— Age proof —
a **Entries regarding dates of birth contained in the scholar’s register and the secondary school examination — Held, as no person on whose information the dates of birth was mentioned in the school record was examined — entries have no probative value—Birad Mal Singhvi v. Anand Purohit — relied upon. (Para 10)**

b **(G) Criminal Jurisprudence — Conviction — basing on an approximate date — Held, In a criminal case, the conviction of the appellant cannot be based on an approximate date — which is not supported by any record—Sunil v. State of Haryana— relied upon. (Para 10)**

c **Facts:-**

d As per the prosecution case the family of the prosecutrix was the tenant of the father of the accused. The prosecutrix, aged about 13 years, was sleeping in the night with her mother in the corridor of her house. At about 4:30 am, the respondent-accused entered into the house of the prosecutrix, took her to the adjoining room at the point of knife, bolted the door and committed rape on her. After committing the offence the accused and the prosecutrix remained in that room. Thereafter, the mother and sister of the prosecutrix came to that room in search of the prosecutrix and when the door was opened, the accused-respondent fled away.

e The Trial Court found the age of the prosecutrix to be less than 16 years, in which case the question of consent did not arise and the respondent having committed rape on a girl of less than 16 years of age, the offence clearly fell within the parameters of rape under Section 376 of IPC. Consequently, the respondent was convicted for the charge and was sentenced to seven year rigorous.

f In appeal the High Court found that the school certificate was not proved without doubt. The medical evidence relied upon by the Trial Court was disbelieved by the High Court as the doctor who conducted the ossification test was not examined. X-ray report containing the opinion of the doctor was also disbelieved by the High Court as it was merely technical
g opinion and the doctor was not produced for examination by the Trial Court.

h The pivotal fact for overturning the judgment of the Trial Court was the deposition made by the mother of the prosecutrix that she and her elder daughter started searching the prosecutrix and when they opened the door of the room, they found that the accused was standing with the prosecutrix behind the bags. In the present appeal before the hon’ble Apex Court, State attacked the judgment of acquittal passed by the High Court, mainly on two grounds. First is whether the sexual intercourse was consensual; and second,

whether the age of the prosecutrix was below 16 years.

It appeared to the Court that the Ossification Test X-ray report was not sufficient to prove the age of the girl. Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, it was held that 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. It was held that, the question of rape does not arise as consensual intercourse has been proved.

Law of relief:

In a criminal case, the conviction of the appellant cannot be based on an approximate date.

Held:-

The High Court while setting aside the Trial Court judgment rightly appraised the evidence on record and held that the sexual intercourse was consensual. In her statement the prosecutrix (PW5) states that she was sleeping between her mother and brother and the accused had reached her after hopping over them and he dragged her into another room on the point of a knife. However, sneaking in with such ease is highly doubtful. Even if the accused made it through to the prosecutrix, it seems unnatural that the prosecutrix was not alarmed by the knife upon being awakened from her sleep. It is also to be noted that the prosecution never recovered any knife. Further examination of the statement of PW5 that the accused and the prosecutrix remained in the room for couple of hours and it was only when her mother and elder sister came searching for her that the prosecutrix was found in the room with the accused, hiding behind the bags. The above narration leads to the inference that the prosecutrix was a consenting party. (Para 6)

From the X-ray report of the ossification test, the doctor opined that the age of the prosecutrix could not be more than 14 years. However, since the doctor was never examined, the X-ray report is not sufficient to prove the age of the prosecutrix. The prosecutrix was examined as PW5 but the prosecution failed to question the prosecutrix on her age, therefore no fact could be gathered from her regarding the issue of age. PW6 Malti Devi mother of the prosecutrix was examined where she stated the age of prosecutrix to be 13 years. However, in her cross-examination, she

a stated that her marriage was performed about 20 years ago and after two years of her marriage the elder daughter (Sunita) was born, and 2
b -3 years thereafter the prosecutrix was born. It means that the prosecutrix was aged about 15- 16 years at the time of the incident. But this is not sufficient to come to any conclusion about the exact age of the prosecutrix. It appears that the Ossification Test X-ray report is not sufficient to prove the age of the girl. Further, the mother of the
c prosecutrix also was not able to give the exact age of the 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. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent. (Para 9)

d This Court in the case of Birad Mal Singhvi v. Anand Purohit, (1988) Supp. SCC 604, has held:

e "17. ...the entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates were mentioned in the school record was examined."

f Further it was held by this Court in the case of Sunil v. State of Haryana, (2010) 1 SCC 742 that –

g "26. 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." (Para 10)

Cases Referred:-

1. *Birad Mal Singhvi v. Anand Purohit, (1988) Supp. SCC 604. (Para 10)*
2. *Sunil v. State of Haryana, (2010) 1 SCC 742. (Para 10)*

JUDGMENT

h **PINAKI CHANDRA GHOSE, J.:** - This appeal, by special leave, is directed against the judgment and order dated 14th August, 2008 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.776 of 1994, whereby the High Court allowed the criminal appeal filed by the respondent herein and acquitted him.

2. The brief facts necessary to dispose of this appeal are that the family of the prosecutrix (PW5) was the tenant of the father of the accused. As per the prosecution story, on 5th May, 1991, the prosecutrix, aged about 13 years, was sleeping in the night with her mother in the corridor of her house. At about 4:30 am, the respondent -accused entered into the house of the prosecutrix, took her to the adjoining room at the point of knife, bolted the door and committed rape on her. After committing the offence the accused and the prosecutrix remained in that room. Thereafter, the mother and sister of the prosecutrix came to that room in search of the prosecutrix and when the door was opened, the accused-respondent fled away. The prosecutrix lodged the FIR at Garha Police Station after which the Investigating Officer sent the prosecutrix for medical examination wherein the report was handed over by Dr. Nisha Sahu. The Investigating Officer received the date of birth of the prosecutrix. The respondent-accused was arrested on 6th May, 1991. The Ossification Test of the prosecutrix was conducted and the report was proved in the present case.

3. The charge under Section 376 of the Indian Penal Code was framed against the respondent. The respondent pleaded not guilty and claimed trial. After examining the witnesses and after hearing the counsel for the parties, the Trial Court found that the charge was proved beyond reasonable doubt. The Trial Court found the age of the prosecutrix to be less than 16 years, in which case the question of consent did not arise and the respondent having committed rape on a girl of less than 16 years of age, the offence clearly fell within the parameters of rape under Section 376 of IPC. Consequently, the respondent was convicted for the charge and was sentenced to seven year rigorous imprisonment by the Trial Court by its judgment and order dated 30.07.1994.

4. Being aggrieved by the judgment and order dated 30.07.1994, passed by the Trial Court, the respondent preferred Criminal Appeal No.776 of 1994 before the High Court of Madhya Pradesh. The High Court found that the school certificate was not proved without doubt. The medical evidence relied upon by the Trial Court was disbelieved by the High Court as the doctor who conducted the ossification test was not examined. X-ray report containing the opinion of the doctor was also disbelieved by the High Court as it was merely technical opinion and the doctor was not produced for examination by the Trial Court. The pivotal fact for

a overturning the judgment of the Trial Court was the deposition made by PW6 i.e. Malti Devi, mother of the prosecutrix where she stated that in the morning when she saw that the prosecutrix was not lying with her, she and her elder daughter started searching the prosecutrix and when they opened the door of the room, they found that the accused was standing with the prosecutrix behind the bags. The High Court, therefore, allowed the said appeal, set-aside the conviction of the respondent and acquitted him of the charge under Section 376 IPC.

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c 5. The State is thus before us in appeal against the acquittal of the respondent. The learned counsel appearing for the State has attacked the judgment of acquittal passed by the High Court, mainly on two grounds. First is whether the sexual intercourse was consensual; and second, whether the age of the prosecutrix was below 16 years.

d 6. The High Court while setting aside the Trial Court judgment rightly appraised the evidence on record and held that the sexual intercourse was consensual. In her statement the prosecutrix (PW5) states that she was sleeping between her mother and brother and the accused had reached her after hopping over them and he dragged her into another room on the point of a knife. However, sneaking in with such ease is highly doubtful. Even if the accused made it through to the prosecutrix, it seems unnatural that the prosecutrix was not alarmed by the knife upon being awakened from her sleep. It is also to be noted that the prosecution never recovered any knife. Further examination of the statement of PW5 that the accused and the prosecutrix remained in the room for couple of hours and it was only when her mother and elder sister came searching for her that the prosecutrix was found in the room with the accused, hiding behind the bags. The above narration leads to the inference that the prosecutrix was a consenting party.

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g 7. Section 375 (as it stood before the Criminal Law Amendment Act, 2013) of the Indian Penal Code, 1860 states –

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

h Sixthly – With or without her consent, when she is under sixteen years of age...”

In light of the aforementioned provision, the second issue regarding the determination of age of the prosecutrix is crucial to establish whether the respondent is liable for rape or not. a

8. 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 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. b
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9. From the X-ray report of the ossification test, the doctor opined that the age of the prosecutrix could not be more than 14 years. However, since the doctor was never examined, the X-ray report is not sufficient to prove the age of the prosecutrix. The prosecutrix was examined as PW5 but the prosecution failed to question the prosecutrix on her age, therefore no fact could be gathered from her regarding the issue of age. PW6 Malti Devi mother of the prosecutrix was examined where she stated the age of prosecutrix to be 13 years. However, in her cross-examination, she stated that her marriage was performed about 20 years ago and after two years of her marriage the elder daughter (Sunita) was born, and 2-3 years thereafter the prosecutrix was born. It means that the prosecutrix was aged about 15- 16 years at the time of the incident. But this is not sufficient to come to any conclusion about the exact age of the prosecutrix. It appears that the Ossification Test X-ray report is not sufficient to prove the age of the girl. Further, the mother of the prosecutrix also was not able to give the exact age of the 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 e
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to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed
a that the girl was more than 16 years of age and was competent to give her consent.

10. This Court in the case of **Birad Mal Singhvi v. Anand Purohit, (1988) Supp. SCC 604**, has held:

b "17. ...the entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates were mentioned in the school record was examined."

c Further it was held by this Court in the case of **Sunil v. State of Haryana, (2010) 1 SCC 742** that –

d "26. 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."

11. In view of the evidence on record and the rationale in the aforementioned cases, we are of a considered view 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.

e Therefore, it can be held that the girl was more than 16 years of age and she was competent to give her consent as held by the High Court. Hence, in the present case, the question of rape does not arise as consensual intercourse has been proved.

f 12. Thus, in the light of the above discussion, we are of the view that the present appeal is devoid of any merit, and we find no ground to interfere with the judgment passed by the High Court. The appeal is, accordingly, dismissed.

Result: -

g Appeal dismissed.

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