

HIGH COURT OF MADHYA PRADESH**BENCH GWALIOR****SINGLE BENCH:****HON'BLE SHRI JUSTICE G.S. AHLUWALIA****Criminal Appeal No.24/2006**

.....Appellant: Ramkishan @ Raja

Versus

.....Respondent : State of M.P.

Shri V.K. Saxena, Senior Advocate with Shri Aditya Singh,
Counsel for the appellant.

Shri Devendra Chaubey, Public Prosecutor for the
respondent/State.

Date of hearing : 19/07/2018

Date of Judgment : 26/07/2018

Whether approved for reporting : Yes

J U D G M E N T**(26/07/2018)**

This criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment dated 13.12.2005 passed by 1st ASJ, Dabra, District Gwalior in S.T.No.191/2005 by which the appellant has been convicted for offence punishable under Sections 363, 366 and 376 of IPC and has been sentenced to undergo the rigorous imprisonment of three years and a fine of Rs.1,000/-, five years rigorous imprisonment and a fine of Rs.5000/- and 10 years rigorous imprisonment and a fine of Rs.10,000/- with default imprisonment, respectively. It has

also been directed by the Trial Court that out of the total fine amount, an amount of Rs.10,000/- be paid to the prosecutrix by way of compensation and all the sentences have been directed to run concurrently.

2. The necessary facts for the disposal of the present appeal in short are that on 1.4.2004, the complainant Atar Singh Jatav lodged a Gum Insan report alleging that his 13 years of old daughter had gone to Chinor on 24.3.2004 for appearing in the examination of Class 8th and has not returned back and inspite of the best efforts, her whereabouts could not be ascertained. A Gum Insan case was registered as 3/2004 and the matter was investigated by Head Constable Pancham Singh. The statements of the witnesses were recorded who stated that the appellant Ramkishan @ Raja has taken away the prosecutrix. Accordingly, the FIR in Crime No.53/2004 was registered for offence under Sections 363, 366 of IPC. The prosecutrix was recovered from the possession of the appellant along with three months old boy. The prosecutrix was got medically examined, her statement was recorded and she made specific allegations of commission of rape by the appellant and it was also stated by her that the co-accused Kamlesh had assisted the appellant Ramkishan @ Raja. Accordingly, the police after concluding the investigation filed the charge sheet against the appellant and the co-accused Kamlesh for offence under Sections 363, 366, 376 of IPC.

3. The Trial Court framed charges under Section 363, 366, 376 of IPC against the appellant and framed the charge under Section 366 of IPC against the co-accused Kamlesh.

4. The appellant and the co-accused Kamlesh, abjured their guilt and pleaded not guilty.

5. The prosecution in order to prove its case, examined the prosecutrix (PW-1), Atar Singh (PW-2), Sohan Singh (PW-3), Jogendra (PW-4), Pancham Singh (PW-5), Ramvaran Singh (PW-6), Ramsharan Barua (PW-7), Dr. Shobha Chaturvedi (PW-8), Dr. J.S. Sikarwar (PW-9), Mohar Singh (PW-10), Bhawar Singh Jadon (PW-11), S.K. Saxena (PW-12), Naresh Dubey (PW-13) and Chandrabhan Singh (PW-14).

6. The appellant and the co-accused did not examine any witness in their defence.

7. The Trial Court by judgment dated 13.12.2005 passed in S.T.No.191/2005, convicted the appellant for offence under Sections 363, 366, 376 of IPC and sentenced him to undergo the rigorous imprisonment of three years and a fine of Rs.1,000/-, five years rigorous imprisonment and a fine of Rs.5000/- and 10 years rigorous imprisonment and a fine of Rs.10,000/- with default imprisonment, respectively.

8. The co-accused Kamlesh was acquitted of all the charges.

9. The acquittal of the co-accused Kamlesh Viswas has not been challenged by the State or by the complainant, therefore, any reference to Kamlesh Viswas would be in respect of the

allegations made against the present appellant.

10. Challenging the judgment and sentence dated 31.12.2005, it is submitted by the counsel for the appellant that the prosecutrix was major on the date of incident and she on her own had moved from one place to another and had stayed with the appellant for near about one year and was blessed with a son and thus it is clear that the prosecutrix was a consenting party.

11. Per contra, it is submitted by the counsel for the respondent/State that the appellant Raja @ Ramkishan was already a married person having three children. The prosecutrix was undoubtedly minor below 16 years of age and the prosecutrix has specifically stated that during her stay with the appellant for a period of one year the appellant used to beat her mercilessly and she was not allowed to go back to her home. Thus, the prosecutrix has specifically stated that during this period of one year, she was raped by the appellant.

12. The prosecutrix (PW-1) has stated that her date of birth is 2.1.1991 and on 24.3.2004 she had gone to fill up her Examination form for appearing in the examination of Class 8th. She was followed by the appellant who threatened her to accompany her to Gwalior, otherwise she and her brother would be killed. It is further stated that in Gwalior, the appellant took her to hostel where one Sardar Jatav was studying and in the evening of the same day, the appellant

took her to Indore and they reached Indore in the morning of the next day. The appellant took her to the house of his relative and stayed there for three days and during these three days, the appellant had committed rape on her. Thereafter he took her to Ujjain where they stayed in Shriram Lodge for five days and at Ujjain also she was raped by the appellant. From Ujjain they came to Devas and they stayed there for one day in a lodge situated behind the bus stand where also she was raped by the appellant. From Devas they came to Bhopal and stayed in Gurudwara for a period of one month, and there also, she was raped by the appellant. From Bhopal they came to Guna where they stayed for a period of six months with the assistance of co-accused. The appellant used to beat her and rape her. From Guna they went to Sadhora where the appellant opened a clinic. At Sadhora, she gave birth to a child who is now five months old and is residing with her. At Sadhora they stayed for a period of four months and thereafter the appellant extended a threat to compromise the matter and accordingly, brought her to village Pipraua by bus where he was caught by the police. It was further stated that the appellant used to beat her child as well as used to beat the prosecutrix. The appellant was already married and had three children, out of which two were girl and one was boy. The prosecutrix was recovered from the possession of the appellant and the recovery memo is Ex.P/1. She was sent for medical examination and her

ossification test was also conducted. Her marksheet is Ex.P/2 and her date of birth is 2.1.1991. The appellant kept her like his wife but he never allowed her to speak. Her statement under Section 164 of Cr.P.C. was recorded. The prosecutrix was cross-examined in detail and a suggestion was given to her that the date of birth mentioned in the mark sheet Ex.P/2 is wrongly mentioned and the said suggestion was specifically denied by the prosecutrix. She also denied that she was 19 to 20 years of age on the date of the incident. Certain omissions were also got proved from the prosecutrix. A question was put to the prosecutrix with regard to date of birth of her younger brother which she denied for want of knowledge. She also denied that her younger brother was 16 years on the date of incident. She could not narrate the name of the hospital where she gave birth to the child. She further denied the suggestion of enmity on the question of local elections.

13. Atar Singh (PW-2) has also stated that on 24.3.2004 his daughter had left the house for appearing in the examination of Class 8th and thereafter she did not come back and accordingly a Gum Insan Report was lodged on 1.4.2004 as he was trying to search out the prosecutrix. In the meanwhile, he was told by one Gautam that the present appellant has eloped with the daughter of this witness. The Gum Insan Report Ex.P/3 was lodged.

14. Sohan Singh (PW-3) has stated that the appellant had

stayed in Gurudwara along with his wife and the name of his wife was disclosed as Mrs. Sonu R/o Chinor. This witness had brought the register of Gurudwara Nanaksar, Hamidiya Road, Bhopal of the period 10.12.2003 to 18.11.2004 in which the details of the name of the persons staying in Gurudwara, total number of persons, time, place from where they come as well as the place to which they would go and the reasons for staying in the Gurudwara are mentioned. The amount deposited by said persons as well as the number of the room allotted to them is also mentioned in the register. The said register was in 200 pages and as per entry at Srl. No.525 on Page 76, the appellant had stayed in Gurudwara on 31.3.2004 along with his wife and he had disclosed his address as Village Post Chinor, District Gwalior and had disclosed that he has come to Bhopal for taking certificate from the doctor. The relevant entry is Ex.P/4 and its photocopy is Ex.P/4C. The register was seized by the police vide seizure memo Ex.P/5 and it contains the signatures of President of the Managing Committee of Gurudwara. This witness was cross-examined and it was admitted by him that Langar is distributed to devotees and nothing is charged from them. It was accepted by him that the ladies also stay in the Gurudwara and there was no obstruction by the Gurudwara Managing Committee. The appellant along with his wife had stayed there for a period of one month and during this period he had never heard any

dispute between them. He had further clarified that the rooms are having attached latrine and bathroom and the appellant and his wife were staying in the same room.

15. Jogendra (PW-4) has stated that the prosecutrix is known to him who is aged about 14 years. He saw her at bus stand Pipraua along with the appellant as well as one and half month old child. The appellant was arrested and the prosecutrix was recovered by the police. The recovery panchanama Ex.P/1 was prepared. The appellant was arrested by Ex.P/5.

16. Pancham Singh (PW-5) has stated that on 1.4.2004 he had received the diary of Gum Insan Report No.3/2004 and the FIR lodged by him after conducting the enquiry is Ex.P/6 and the Gum Insan enquiry report is Ex.P/7. In cross-examination, it was clarified by this witness that a separate case diary is prepared for Gum Insan enquiry in which every detail of enquiry conducted by the Enquiry Officer is mentioned.

17. Ramvaran Singh (PW-6) has stated that he had seized the register from Sriram Lodge vide seizure memo Ex.P/8 and the papers of register were seized vide Ex.P/9 and P/10. Thereafter, they went to Gurudwara Hamidiya Road, Bhopal where the photocopy of the register was seized which is Ex.P/4C and the seizure memo is Ex.P/5. These documents were seized from his possession vide seizure memo Ex.P/11 on 20.5.2005.

18. Ramsharan Barua (PW-7) has stated that Constable

Ramkishan had brought three packets and three specimen of seal from hospital which were seized by this witness vide Ex.P/11.

19. Dr. Shobha Chaturvedi (PW-8) had medically examined the prosecutrix and did not find any external injury and prosecutrix had given birth to a child which was visible from the symptoms from the body of the prosecutrix. The medical report is Ex.P/12. In cross-examination, this witness has stated that for delivery, the prosecutrix had not undergone Cesarean operation. She has further stated that the prosecutrix appeared to be 13 years of age and as the mensuration cycle starts from the age of 13 years, therefore, the prosecutrix was competent to give birth to a child.

20. Dr. J.S. Sikarwar (PW-9) had conducted the ossification test of the prosecutrix and had opined that the age of the prosecutrix is more than 16 years but she was below 18 years of age. The ossification report given by Dr. J.S. Sikarwar is Ex.P/13 and the x-ray plates are Ex.P/14, Ex.P/15 and Ex.P/16.

21. Mohar Singh (PW-10) had arrested the co-accused Kamlesh vide arrest memo Ex.P/17 and he was sent for medical examination vide Ex.P/18.

22. Bhawar Singh Jadon (PW-11) is the Head Constable who went to Primary Health Centre, Shadhora, District Guna where he seized the bed head ticket dated 11.1.2005 of the prosecutrix concerning the delivery of child by the prosecutrix.

The bed head ticket is Ex.P/19 and the OPD ticket of the prosecutrix is Ex.P/20. Thereafter, this witness went to Sriram Lodge, Ujjain near bus stand Devas Gate and seized the record of Sriram Lodge, according to which the appellant had stayed in the said hotel from 26.3.2004 to 29.3.2004 and copy of the register is Ex.P/9 and Ex.P/10 which was seized vide seizure memo Ex.P/8. Thereafter this witness went to Gurudwara, Bhopal on 13.4.2005 and seized the register from Gurudwara vide seizure memo Ex.P/15 and the photocopy of the register of the Gurudwara is Ex.P/4C which is attested by the Manager of the Gurudwara Managing Committee.

23. S.K. Saxena (PW-12) had medically examined the appellant and he was found competent for intercourse and the MLC report is Ex.P/21.

24. Naresh Dubey (PW-13) is the Investigating Officer who had lodged the FIR Ex.P/7, on the basis of the Gum Insan Report submitted by Pancham Singh Head Constable No.1776. The spot map Ex.P/3 was prepared and this witness had recorded the statements of Atar Singh and Rajeshwari Devi. In cross-examination, a question was put to this witness that why the Gum Insan Complaint has not been filed in the present case, then in reply, it was submitted by him that it was not possible to include the copy of Gum Insan complaint and other documents in the case diary. He further admitted that a separate diary is maintained for Gum Insan complaints. He

further stated that he had recorded the statements of the person in the same manner in which it was narrated by them.

25. Chandrabhan Singh (PW-14) has stated that he had arrested the appellant from Pipraua Tiraha on 9.4.2005 vide arrest memo Ex.P/5 and the prosecutrix aged about 14 years was recovered from the possession of the appellant along with a minor boy aged about three months and the recovery memo Ex.P/1 was prepared. The case dairy statement of the prosecutrix Ex.D/1 was recorded. The appellant was got medically examined which is Ex.P/21 and the medical report of the prosecutrix is Ex.P/12. For verifying the statement of the appellant as well as the prosecutrix, he had sent Bhawar Singh, the Head Constable as well as the appellant who was on police remand. In cross-examination he has submitted that he got the information at the police station that the appellant has started by bus from Gwalior at 11:00 AM. As this witness was not in possession of Rojnamcha Sanha, therefore, he could not tell that whether the said information was recorded in the Rojnamcha Sanha or not. It is further submitted that he reached on the spot at about 12:15-12:30 PM and at that time the appellant was at Pipraua Tiraha and the prosecutrix was sitting near the appellant. At the time of his arrest, the search was taken but nothing was found. He denied that the brother of the prosecutrix had called him from the police station by informing that the prosecutrix is sitting near the square. The

prosecutrix was sent for medical examination along with a lady constable and the parents of the prosecutrix had not met with this witness prior to her medical examination. He further denied that the case diary statement Ex.D/1 was prepared at the police station.

26. Challenging the findings and conviction recorded by the Trial Court, it is submitted by the counsel for the appellant that the prosecutrix was above 16 years of age at the relevant time. As per Section 375 sixthly of IPC the minimum age prescribed was 16 years. It is further submitted that as per the ossification report, the prosecutrix was above 16 years of age and under these circumstances the date of birth of the prosecutrix mentioned in the school record should be discarded.

27. Per contra, it is submitted by the counsel for the respondent/State that in order to ascertain the age of the victim, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would be relevant and under these circumstances when the school record is available, then no reliance can be placed on the ossification report. Even otherwise, it is well established principle of law that the ossification report is not conclusive, and the school certificate/marksheet is admissible under Section 35 of Evidence Act.

28. Heard the learned counsel for the parties.

29. The following two questions would arise in the present case:-

- (i) Whether the prosecutrix was below 16 years of age on the date of the incident? and
- (ii) whether the prosecutrix was a consenting party?

The answer to the question No.2 would depend on the answer to the question No.1.

30. In the present case, the prosecutrix went missing on 24.3.2004 and she could be recovered on 9.5.2005 i.e. after more than one year after she was kidnapped. When the prosecutrix was recovered, she was having a three months old child in her lap. The ossification test of the prosecutrix was conducted on 11.4.2005 i.e. one year after the prosecutrix was taken away by the appellant.

31. A Gum Insan Report was lodged on 1.4.2004 and the said diary was handed over to the Head Constable Pancham Singh (PW-5) and after recording the statements of various witnesses, Pancham Singh (PW-5) submitted a report Ex.P/6 on 21.4.2004 to the effect that the prosecutrix has gone away with the appellant. Thereafter, the prosecutrix was recovered from the possession of the appellant on 9.4.2005 from Bus Stand, Police Station Chinor, District Gwalior along with a minor boy aged about three months.

32. The prosecutrix (PW-1) has stated that her date of birth is 2.1.1991 and her mark sheet is Ex.P/2 in which her date of

birth is mentioned as 2.1.1991 and the said mark sheet is of the Primary School Examination 2002. Although the appellant has challenged the date of birth of the prosecutrix but if the date of birth of the prosecutrix is considered in the light of the ossification test report Ex.P/13, then it would be clear that when the appellant took away the prosecutrix with him, she was below 16 years of age. As already pointed out that the appellant took away the prosecutrix with her on 23.4.2004 and she was recovered from the possession of the appellant on 9.4.2005 i.e. after more than one year. She was subjected to ossification test on 11.4.2005 and as per the ossification test report Ex.P/13, the prosecutrix was more than 16 years of age but below 18 years of age. The report given by Dr. J.S. Sikarwar (PW-9) reads as under:-

"All the epiphysis at elbow its appears fused, epiphysis at the lower end of radius and ulna are incompletely fused as well as iliac crest is also incompletely fused. Hence age of the subject in my opinion is above 16 years below 18 years."

33. So far as the ossification test report is concerned, it is not conclusive proof. The Supreme Court in the case of **Mukarrab Vs. State of U.P.** reported in **(2017) 2 SCC 210** has held as under :

"26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At p. 31 of *Modi's Textbook of Medical*

Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following Table, but it must be remembered that too much reliance should not be placed on this Table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development."

Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.

27. In a recent judgment, *State of M.P. v. Anoop Singh*, it was held that the ossification test is not the sole criteria for age determination. Following *Babloo Pasi* and *Anoop Singh* cases, we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.

28. At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan", which reads as under:

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in

younger age group by dentition and ossification along with epiphyseal fusion.

[Ref.: *Gray H. Gray's Anatomy*, 37th Edn., Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref.: *Parikh C.K. Parikh's Textbook of Medical Jurisprudence and Toxicology*, 5th Edn., Mumbai Medico-Legal Centre Colaba: 1990; 44-45];

* * *

Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan" by Dr Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973]."

29. In the present case, their physical, dental and radiological examinations were carried out. Radiological examination of skull (AP and lateral view), sternum (AP and lateral view) and sacrum (lateral view) was advised and performed. As per the medical report, there was no indication for dental x-rays since both the accused were much beyond 25 years of age. Therefore, the age determination based on ossification test though may be useful is not conclusive. An x-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a person's life."

In the case of **Ramdeo Chauhan alias Raj Nath v. State of Assam** reported in **(2001) 5 SCC 714** , the Supreme Court has held as under :

"....An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert

but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

17. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."

The Supreme Court in the case of **Arjun Singh Vs. State of H.P.** reported in **AIR 2006 SC 1568** has held as under :

"7. In State of Chhattisgarh v. Lekhram [2006 (5) SCC 736] it was held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). It may be true that the entry of the school register is not conclusive but it has evidentiary value."

34. Dr. J.S. Sikarwar (PW-9) in his cross-examination has stated that he is sure that the prosecutrix on the date of the ossification test was more than 16 years of age i.e. on 11.4.2005 and therefore, if the age of the prosecutrix, as on the date of her disappearance i.e. on 24.3.2004 is assessed on the basis of ossification test report, Ex. P/13 , then it would certainly come to 15 years. It is submitted by the Counsel for the appellant, that when there is a possibility of margin of error of two years, then the view in favor of the appellant/accused

should be taken and it should be held that on the date of the kidnapping, the prosecutrix was above 16 years of age. The submission made by the Counsel for the appellant cannot be accepted and hence it is rejected. Now it is well known, that the margin of error two years in assessing the age of the victim, on the basis of report of ossification test is possible. However, there is no hard and fast rule, that the said margin of two years should always be taken on the higher side. Whether the margin of error of two years, is to be taken on lower side or on higher side, would depend on the facts and circumstances of each case. The Supreme Court in the case of **Ram Suresh Singh Vs. Prabhat Singh** reported in **(2009) 6 SCC 681** has held as under :

"15. We are not oblivious of the fact that it is difficult to lay down a law as to whether in a case of this nature, the lower or the upper age or the average age should be taken into consideration. Each case depends on its own facts."

In the case of **Jaya Mala v. Govt. of J&K** reported in **(1982) 2 SCC 538**, the Supreme Court has held as under :

"9. ... 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."

Thus, if the ossification test report, Ex. P.13 is considered along with the school certificate, then it would be clear that the prosecutrix was less than 16 years of age on the date of kidnapping.

35. So far as the offence punishable under Sections 363 and 366 of IPC are concerned, Atar Singh PW-2 has specifically stated that without the permission and knowledge of this witness, the prosecutrix did not return back on 24.3.2004. The prosecutrix (PW-1) has also not stated in her evidence that she had left her house after obtaining due permission from her father and mother. Offence under Section 363 of IPC would be made out if a person takes away or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, out of the keeping of the lawful guardian of such minor without the consent of such guardian from lawful guardianship. It is not the case of the appellant or the prosecutrix or Atar Singh (PW-2) that the appellant had taken away the prosecutrix after obtaining due permission from her father. In the present case, it is also clear from the record that the prosecutrix was kidnapped by the appellant in order to compel her for marriage and accordingly, she was blessed with a child who was aged about three months, on the date of the recovery from the possession of the appellant. Accordingly, it is clear that the prosecution has succeeded in establishing that the appellant had kidnapped the prosecutrix with an intention to compel her for marriage. The prosecutrix (PW-1) has stated in her examination-in-chief itself that the appellant was already married having three children. This statement of the prosecutrix has not been challenged by the appellant in his

cross-examination. Thus it is clear that the appellant who was already married and was having three children, kidnapped the prosecutrix who was minor below the age of 16 years on the date of the incident and moved from one place to another and stayed at different places and at every place he projected the prosecutrix as his wife and because of the physical relationship between the appellant and the prosecutrix, the prosecutrix was blessed with a son.

36. Now the next question for determination is that whether the prosecutrix was a consenting party or not?

37. As this Court has already come to a conclusion that the prosecutrix was below the age of 16 years on the date when she was kidnapped by the appellant, therefore, under these circumstances, the submissions made by the counsel for the appellant that the prosecutrix herself was a consenting party as she was moving along with the appellant from one place to another and she also gave birth to a child, cannot be accepted as the prosecutrix was minor, below the age of 16 years on the date of the kidnapping, therefore her consent would be immaterial.

38. The Supreme Court in the case of **Satish Kumar Jayanti Lal Dabgar Vs. State of Gujarat** reported in **(2015) 7 SCC**

359 has held as under:-

"14. The first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of

Section 375 IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

"375. Rape.—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—

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

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

The Supreme Court in the case of **Kailash Vs. State of M.P.** reported in **(2013) 14 SCC 340** has held as under :

"13. When we apply the above principles laid down by this Court with particular reference to the consideration made by the trial court in para 14, the evidence of doctor, PW 2 as well as the conclusion arrived at by the High Court in para 9, we are convinced with the conclusion that PW 4 was in the age group of 13/14 years. Once the said conclusion cannot be altered, that the sexual intercourse indulged in by the appellant was with the consent of PW 4 will be of no consequence."

39. Under these circumstances, as the prosecutrix was below the age of 16 years on 24.3.2004 when she was kidnapped by the appellant and was certainly below the age of 18 years for the purposes of offence under Sections 363, 366 of IPC on 23.4.2004, this Court is of the considered opinion that the prosecution has succeeded in establishing that the appellant had committed an offence punishable under Sections 363, 366, 376 of IPC. Accordingly, the appellant is held guilty for committing offence under Sections 363, 366, 376 of IPC.

40. It is next contended by the counsel for the appellant that under Section 376 of IPC, the jail sentence of rigorous imprisonment of 10 years is excessive.

41. Considered the submissions made by the counsel for the appellant.

42. The prosecutrix in paragraph 1 of her examination-in-chief has stated that the appellant was already married and was having three children and this claim/allegation of the prosecutrix has not been challenged by the appellant by challenging the same in the cross-examination of this witness.

Under these circumstances, when the appellant himself was already married and was having three children, then kidnapping a minor girl below the age of 16 years and moving from one place to another for a period of one year, as a result of which the prosecutrix gave birth to a male child, this Court is of the considered opinion that the sentence of rigorous imprisonment of 10 years as awarded by the Trial Court for offence under Section 376 of IPC does not require any interference. Accordingly, the judgment and sentence dated 13.12.2005 passed by 1st ASJ, Dabra, District Gwalior in S.T.No.191/2005 is hereby affirmed.

43. The appellant is on bail. His bail bonds and surety bonds are hereby cancelled. The appellant is directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

44. The appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
Judge
26/07/2018

(alok)