HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

PRESENT:

HON'BLE MR. JUSTICE G.S. AHLUWALIA

Criminal Appeal No.658 of 2007

Ram Kishan

-Vs-

State of M.P.

Shri A.S. Rathore, counsel for the appellant.

Shri Arun Barua, Panel Lawyer for the respondent/State.

J U D G M E N T
(01/12/2016)

This appeal has been filed under Section 374 (2) of CrPC against the judgment dated 26th May, 2007 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Shivpuri in Special Sessions Trial No.53/2007 by which the appellant has been convicted under Section 376 (1) of IPC and has been sentenced to undergo the rigorous imprisonment of 7 years with fine of Rs.500/-. It was further directed that in default of payment of fine, the appellant shall further undergo imprisonment of two months.

2. The necessary facts for the disposal of this appeal, in short are that one Bharosa was residing with his three daughters and two sons along with his wife in Village Kutwara. He was working as chowkidar in Village Kutwara. The prosecutrix is his eldest child. Bharosa was suffering from tuberculosis, therefore, he was staying away from his house along with his wife Ramwati for his treatment. During this period, the prosecutrix and her younger brothers and

sisters were residing in village Kutwara. The appellant was residing all alone in the house adjoining that of the prosecutrix. The prosecutrix was aged about 15 years and the appellant used to take her to his room, where he had committed forcible intercourse with her on various occasions, as a result of which, the prosecutrix became pregnant. When the parents of the prosecutrix came back to Village Kutwara after treatment, then they came to know about pregnancy of the prosecutrix. Thereafter, the prosecutrix informed them about the incident and she was taken to Hatod by her parents, where she gave birth to a male child. On 17.05.2005, the prosecutrix lodged a FIR against the appellant. As admittedly prosecutrix belongs to Scheduled Caste and the appellant was *lodhi* by caste, therefore, the police registered the offence under Sections 376, 506 (B) of IPC and under Section 3 (1)(xii) of S.C./S.T. (Prevention of Atrocities) Act, 1989. The medical examination of the prosecutrix was got done. The mark-sheet of the primary school examination of the prosecutrix was obtained, according to which, her date of birth was mentioned as 17.04.1989. As the appellant was absconding, therefore, he could be arrested only after one-and-half years of lodging of the FIR. On medical examination, he was found competent for intercourse. The police after completing the investigation filed the charge-sheet.

3. The Trial Court framed charges against the appellant under Section 376 (1) of IPC and Section 3 (1)(v) of S.C./S.T. (Prevention of Atrocities) Act, 1989. The appellant abjured his guilt and pleaded not guilty. The Trial Court by the judgment dated 25.06.2007 acquitted the appellant of the charge under Section 3 (2)(v) of S.C./S.T. (Prevention of Atrocities) Act, 1989 but convicted him under Section 376

(1) of IPC and sentenced him to undergo rigorous imprisonment of seven years with fine of Rs.500 and default imprisonment was also imposed.

4. It is argued by the counsel for the appellant that the prosecutrix was major on the date of incident and the Trial Court has committed an error by holding that the prosecutrix was minor. It was further submitted that the Trial Court has wrongly relied upon the mark-sheet of the prosecutrix (Exhibit P-5) and the prosecution itself had filed the ossification report of the prosecutrix, according to which, she was 18-20 years of age. It was further submitted that the FIR was lodged after a delay of more than one year and plausible explanation has not been given by the prosecution for the delay in lodging the FIR.

5. *Per contra*, the counsel for the respondent submitted that the prosecutrix was minor and under the facts and circumstances of the case, it cannot be said that there was any unexplained delay in the matter. It was further submitted that the Trial Court has rightly convicted the appellant under Section 376 (1) of IPC.

6. Considered the arguments advanced by the counsel for the parties and perused the record.

7. The first question for consideration is that whether the prosecutrix was minor on the date when the alleged offence is said to have been committed by the appellant.

8. On 01.07.2005, at about 12.30, the prosecutrix lodged a FIR in Police Station Inder, Distt. Shivpuri alleging that as her father had fallen ill and had gone to Shivpuri for his treatment along with her mother and she was residing all alone along with her younger brothers and sisters, the appellant finding her to be all-alone used to take her to his room and had committed forcible intercourse continuously

in his room and had also committed forcible intercourse in her house on day and night. When the prosecutrix got pregnant and informed the appellant about her pregnancy then the appellant extended threat that in case she informs about this fact to anyone then he would kill her as well as also commit suicide by consuming some pills and, therefore, she didn't tell anybody. When she was not keeping good health, then she informed about her pregnancy to her parents. She delivered a male child. It was alleged that the appellant without her consent had forcibly committed intercourse with her, as a result of which, she had given a birth to male child.

9. The prosecution in order to prove the age of the prosecutrix has relied upon the certificate of Primary School examination which was held in the year 2001. In the said certificate, the date of birth of the prosecutrix was mentioned as 17.04.1989. Here, it is important to mention that the prosecution did not examine anybody from the school to prove this document. This certificate has been got proved by the prosecutrix (P.W.3) and investigating officer Amrendra Singh (P.W.7) who has simply stated that during investigation, he had collected the primary school examination certificate, in which, the date of birth of the prosecutrix was mentioned. This witness has not stated that from whom he had got the certificate. However, the prosecutrix (P.W.3) has stated in her examination-in-chief that the Primary School Examination Certificate was made available by her to the investigating officer.

10. In order to prove the school mark-sheet, the prosecution was under obligation to examine the person who had made the entry of the date of birth of the prosecutrix in the school register. Since, the prosecutrix was

studying in a Government school, therefore, the prosecution could have examined the Head Master of the school to prove the school certificate or the date of birth.

11. It is not out of place to mention here that in the present case the prosecution in its wisdom has not chosen to examine any witness from the school to prove the date of birth of the prosecutrix. Even Bharosa (P.W.4), father of the prosecutrix has not stated in his evidence that he had got the date of birth of the prosecutrix recorded in the school at the time of admission.

12. In the case of **Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.** reported in **(2013) 14 SCC 637**, the Supreme Court in order to determine the age of the prosecutrix had made a reference to the statutory provision as contained in Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'Rules 2007)). Thus for the purpose of determining the age of the prosecutrix, this Court can refer to Rule 12 of Rules 2007.

13. Rule 12 of Rules 2007 reads as under:-

> **"Rule 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.
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> (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.
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> (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 subrule (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 subrule(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.
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> (emphasis added)

14. As per Rule 12 (3) of the Rules for determining the age of the Juvenile, the committee may seek 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 playschool) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

15. In absence of the above-mentioned three documents, the medical opinion will be sought from a duly constituted Medical Board. Thus, it is clear that while determining the age of the prosecutrix either the school certificate or the birth certificate would be the conclusive proof as contained in clause 12 (a)(i), (ii) & (iii) and in absence of the above-mentioned documents, then the medical opinion will be the conclusive proof of the age as regards the victim.

16. In the case of **Ashwani Kumar Saxena v. State of Madhya Pradesh** reported in **(2012) 9 SCC 750**, the Supreme Court had held that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. Relying on the judgment passed by the Supreme Court in the case of **Ashwani Kumar Saxena** (supra), it was contended by the

counsel for the appellant that since the admission register in the school in which the prosecutrix was first attended was withheld by the prosecution and, therefore, adverse inference should be drawn.

17. Considering the provisions of Rule 12 of Rules 2007 as well as the fact that the prosecution did not examine any witness from the school to depose that on whose information the date of birth was mentioned and what was the date of birth mentioned in the school register, it is held that merely on the evidence of the investigating officer Amrendra Singh (P.W.7) and the prosecutrix (P.W.3), school certificate Exhibit P-5 cannot be said to be proved in accordance with law.

18. It is surprising and astonishing that even the father of the prosecutrix Bharosa (P.W.4) did not say in his evidence that he had got the date of birth of the prosecutrix recorded in the school register. In absence of any evidence with regard to the fact that at whose instance the date of birth of the prosecutrix was recorded in the school register and merely on the oral evidence of the prosecutrix (P.W.3) & Bharosa (P.W.4), it cannot be said that the date of birth of the prosecutrix was 15.4.1989. Now, in absence of any school certificate the only evidence available on record is the report of the ossification test.

19. The ossification test of the prosecutrix was conducted on 02.07.2005 and report was submitted by the Government hospital, Shivpuri mentioning that the upper, lower ends radius and ulna are fused and, therefore radiologically the age of the prosecutrix is above 18 years and below 20 years. This ossification report was filed by the prosecution along with the charge-sheet. However, the prosecution did not think it proper to get it proved by

examining any witness and, therefore, this document remained un-exhibited. However, if any prosecution document which is filed along with the charge-sheet has not been got exhibited/proved by the prosecution by examining any witness and if the said document is favouring the accused, then the accused can take advantage of the same to substantiate his submissions. If the report of the ossification test of the prosecutrix is considered, then it is clear that at least on 2.7.2005 she was 18 years of age. If the date of birth of the prosecutrix is calculated accordingly then it would be clear that the prosecutrix must have born in the year 1987. FIR was lodged on 1.7.2005 alleging that for the last one year, the appellant was committing forcible intercourse with her, that means, the offence was committed for the first time in the year 2004. If the age of the prosecutrix is determined considering the year of birth as 1987 then it would be clear that she was 17 years of age in the year 2004. Thus, it is held that the prosecutrix was major and aged about 18 years even on the date when the alleged offence for the first was committed.

20. It is next contented by the counsel for the appellant that the FIR was lodged after an unexplained delay of more than one year and that too after giving birth of a child. It was contended by him that under the facts and circumstances of the case, the delay in lodging the FIR has a direct bearing on the evidence of the prosecutrix and in absence of any DNA report or any scientific report to establish that the appellant was the biological father of the child, it would be unsafe to rely upon the evidence of the prosecutrix. To buttress his submissions, the counsel for the appellant has relied upon the judgment of the Supreme Court in the case of **Ramdas & Ors. v. State of**

Maharashtra reported in **(2007) 2 SCC 170**.

21. In the present case, the only explanation given by the prosecution for delay in lodging the FIR is that the parents of the prosecutrix were out of the house for a considerable long time as they had gone to Shivpuri for the treatment of the father of the prosecutrix.

22. It is surprising and difficult to believe that the parents could leave their five children all-alone and unattended in the house for months together. According to Bharosa (P.W.4) as he was suffering from tuberculosis, therefore, he was taking treatment from hospital at Shivpuri. While his treatment was going on at Shivpuri, he was residing in Village Hatod along with his wife, whereas his five children were residing in village Kutwara. Why Bharosa (P.W.4) had not taken his five children including small babies with him to Village Hatod**,** why he was required to stay back in village Hatod for his treatment and why he was not residing at Village Kutwara are certain important aspects of the matter which have remained unanswered by the prosecution. The prosecution in order to substantiate the factum of treatment of Bharosa (P.W.4) could have filed the documents of treatment to show that he was suffering from tuberculosis and his treatment was going on in hospital at Shivpuri. Village Kutwara is within the district of Shivpuri. There is nothing on record to show that what is the distance between village Hatod to Village Kutwara and the prosecution was under obligation to prove the distance between village Kutwara and Shivpuri as well as distance between Village Hatod and District Shivpuri. The prosecution has also failed to prove that why the father of the prosecutrix was compelled to stay back at Village Hatod for treatment at Shivpuri. Under these circumstances, it is held that the

prosecution has failed to explain the delay of one year in lodging the FIR.

23. Dr. Anjana Jain (P.W.2), who had examined the prosecutrix has stated that she had advised for DNA test. As the prosecutrix had already given a birth to a child, therefore, the prosecution should have or could have got the DNA test of the child as well as that of the appellant to ascertain that whether the appellant is the biological father of the child or not. Why the prosecution did not choose for getting DNA done has not been explained by it. This lapse on the part of the prosecution gives a deep dent to the prosecution case that the appellant has committed forcible rape with the prosecutrix.

24. In the case of **Ramdas (supra),** the Supreme Court has held that there is no doubt that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. The evidence of the prosecutrix should of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality. Although, mere delay in lodging the FIR may not necessarily be fatal to the prosecution case. However, the delay in lodging the FIR is a relevant fact of which the Court must take notice. While appreciating the evidence, the Court can consider that whether the delay has adversely effected the case of the prosecution or not. In the present case, it is evident from the evidence of Bharosa (P.W.4) that he had stated in examination-in-chief that on some occasion, he used to come back to village Kutwara. If the

appellant had committed any offence with the prosecutrix then she could have informed her father during his casual visit to village Kutwara. Even, the prosecutrix could have informed to any other villagers with regard to commission of offence by the appellant. Even, the prosecution did not choose to examine the mother of the prosecutrix to prove that the prosecutrix had ever informed her about the incident. Under these circumstances, it would be unsafe to convict the appellant on the sole testimony of the prosecutrix.

25. Accordingly, this Court is of the view that the prosecution has miserably failed in proving that the appellant had committed rape upon the prosecutrix, as a result of which, she had given a birth to a child. The judgment of conviction and order of sentence passed by the Court below are set-aside.

26. The appellant is acquitted of the charge under Section 376 (1) of IPC. He is on bail. His bail bonds and surety bonds are discharged. The appeal is accordingly allowed.

27. A copy of this judgment be sent to the Trial Court along with its record for information.

(G.S. AHLUWALIA)
Judge
(01.12.2016)

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