

1 Criminal Appeal No.210/2013
[Golu alias Dhaniram Vs. State of M.P.]

HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

SINGLE BENCH:

HON. SHRI JUSTICE G.S. AHLUWALIA

Criminal Appeal No.210/2013

.....Appellant: Golu alias Dhaniram

Versus

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

Shri S.K. Shrivastava, Counsel for the appellant.

Shri RVS Ghuraiya, Public Prosecutor for the respondent/State.

Date of hearing : 27/09/2018

Date of Judgment : 04/10/2018

Whether approved for reporting : Yes

Law laid down:

Significant paragraphs:

J U D G M E N T
(04/10/2018)

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 5-3-2013 passed by A.S.J., Ganjbasoda, Distt. Vidisha in S.T. No.192/2012, by which the appellant has been convicted under Sections 363 and 376 of I.P.C. and has been sentenced to undergo the rigorous imprisonment of 3 years and a fine of Rs.500/- and rigorous imprisonment of 7 years and a fine of Rs.1500/-, respectively with default imprisonment. Both the sentences have been directed to run concurrently.

The necessary facts for the disposal of the present appeal in

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short are that the complainant Phool Singh, who is the brother of the prosecutrix, had lodged a Gum Insaan report on 9-3-2012 to the effect that the prosecutrix is missing from 8-3-2012. It was mentioned in the report that he had gone to Basoda and when he came back at about 12 A.M. in the night, then he was informed by his mother that the prosecutrix, at about 10-11 P.M., has left the home without informing anybody. A Suspicion was expressed towards the appellant, as he too was missing from his house.

The prosecutrix was recovered from the house of the appellant and her statement was recorded and accordingly, F.I.R. in crime No.174/2012 for offence under Sections 363, 366-A and 376 of I.P.C. was registered. The prosecutrix was got medically examined. The spot map was prepared. The statements of the witnesses were recorded. The appellant was arrested. The vaginal slide and underwear of the prosecutrix as well as the appellant were sent to F.S.L. The report was received and after concluding the investigation, the police filed the charge sheet.

The Trial Court by order dated 24-7-2012, framed charges under Sections 363, 366-A and 376 of I.P.C.

The appellant abjured his guilt and pleaded not guilty.

The prosecution, in order to prove its case, examined Dr. Sunita Nagesh (P.W.1), Dr. B.L. Nagesh (P.W.2), Phool Singh (P.W.3), Babulal Bhavsar (P.W.4), Yogendra Dube (P.W.5), Sita Ahirwar (P.W.6), Daulat Singh Maina (P.W.7), Laxman Anuragi (P.W.8), and Prosecutrix (P.W.9).

The appellant did not examine any witness in his defence.

The Trial Court by judgment and sentence dated 5-3-2013, passed in S.T. No.192/2012, convicted the appellant for offence under Sections 363 and 376 of I.P.C. and sentenced him to undergo the rigorous imprisonment of 3 years and a fine of Rs.500/- and rigorous imprisonment of 7 years and a fine of Rs.1500, respectively with default imprisonment.

Challenging the conviction and sentence recorded by the Trial Court, it is submitted by the Counsel for the appellant, that the Trial Court has wrongly held that the prosecutrix was minor on the date of incident and has failed to see that the prosecutrix was major and she had gone with the appellant on her own and had stayed with the appellant and she was a consenting party.

Per contra, it is submitted by the Counsel for the State that the prosecutrix was minor. The Trial Court, after considering the entire aspects of the matter, has assessed the age of the prosecutrix as below 16 years and under these circumstances, the consent of the prosecutrix would be immaterial. It is further stated that when a minor is taken out of the custody of the guardian without their consent, then it would be clear beyond reasonable doubt that the accused had kidnapped the prosecutrix/minor.

Heard the learned counsel for the parties.

Dr. Sunita Nagesh (P.W.1) had medically examined the prosecutrix (P.W.9). On her examination, no external injury was found on her body and the prosecutrix was found to be physically and mentally well. Her 2nd sexual characters were well developed. On internal examination, all her internal organs like vulva, vagina, labia majora, labia minora and perineum were found to be healthy. Hymen membrane was absent. No definite opinion was given for rape as she was found to be habitual to intercourse. The M.L.C. report is Ex.P.1. This witness had assessed the age of the prosecutrix as 15 years.

Thus, it is clear that no external and internal injury was found on the body of the prosecutrix and she was found to be habitual for sexual intercourse.

The prosecutrix (P.W.9) in her evidence has stated that the appellant is not known to her. Phool Singh is her brother, whereas Smt. Ladhobai is her mother. The appellant was hiding himself behind her house. She was called by the appellant and he gagged

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her mouth and threatened that in case if she raises an alarm, then she would be killed. Thereafter, the appellant took her in his house and confined her. The appellant committed rape on her. Her brother had lodged the report and she had informed her brother about the incident. The police had come to the village and the spot map, Ex. P.11, was prepared. In her cross examination, she admitted that recently she has been married, however, it was stated by her that she is still residing in the village, whereas her matrimonial house is in Sagar. She further stated that she has four brothers, namely, Motilal, Phool Singh, Khilan Singh and Mukesh, however, she could not tell the age of her siblings. She further stated that she has left the school in the last year only. She could not explain as to why it has been mentioned in her case diary statement that she went outside in order to urinate. She could not explain the omission in her case diary statement that she was confined by the appellant in his house. She further stated that prior to the date of incident, she used to sleep along with her mother. She further stated that at about 10 P.M., she had gone to urinate outside the house. She further stated that the house of the appellant is not situated nearer to her house. She further stated that she went outside after opening the door. She further stated that her neighbours were not sleeping by that time. However, she denied the suggestion that the appellant had not done any thing. She further denied the suggestion that she was not taken to the fields. She further stated that from the field, the appellant took her to his house. She further stated that the house of appellant is situated far from her house. The Court, on its own, asked a question that, when the prosecutrix has stated that the appellant is not known to her, then how she could say that he had committed rape on her, then in reply to this question, it was replied by her that she has been raped by the appellant and she meant to say that she had no friendship with the appellant.

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The first question for determination would be as to what was the age of the prosecutrix?

The prosecution has proved the application form, Ex. P.3(c), which was filled by the mother of the prosecutrix, at the time of her admission in class 1st. According to this admission form, the prosecutrix (P.W.9) was admitted in Class I on 13-7-2006.

Babulal Bhavsar (P.W.4) has proved the application for admission and had brought original application form, Ex. P.3, and the photocopy of the same is Ex. P.3(c). He has stated that he is working on the post of Head Master, Govt. Girls Primary School, Gandhi Chowk. The prosecutrix was admitted in the school on 13-7-2006 and her date of birth has been mentioned as 21-9-1999. The admission form contains the signature of the then Head Master, Smt. Munni Devi Kushwah and it also bears the thumb impression of Smt. Ladhobai, the mother of the prosecutrix. The School admission register, Ex. P.4, also contains the date of birth of the prosecutrix as 21-9-1999 and the photocopy of the school admission register is Ex. P.4C. On 16-6-2011, T.C. was issued. This witness in cross examination has admitted that the mother of the prosecutrix was an illiterate lady, therefore, she had put her thumb impression. As this witness was not posted in the school at the relevant time, therefore, he stated that the application for admission was filled by the then Head Master on the dictations of the guardian of the prosecutrix. However, could not explain as to on what basis, the date of birth was mentioned. This witness has further stated that in case of absence of any documentary evidence with regard to the date of birth of the child, then the affidavit of the guardian is obtained.

By referring to the evidence of Phool Singh (P.W.3), it is submitted by the Counsel for the appellant that in view of the admissions made by Phool Singh (P.W.3), it would be clear that, at the time of incident, the prosecutrix was more than 18 years of

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age. Phool Singh (P.W.3) is the brother of the prosecutrix and has been declared hostile and has not supported the prosecution case, in *toto*. Phool Singh (P.W.3) has stated that the appellant had taken away his sister/prosecutrix and they could not be traced, thereafter, a gum insaan report, Ex. P.3, was lodged by him and has stated that he had disclosed the name of the appellant in gum insaan report, as he was told by a small child that the appellant has taken away the prosecutrix. He has further stated that he also came to know that the appellant took the prosecutrix to his field, however, he did not talk to the prosecutrix in this regard. Thereafter, Phool Singh (P.W.3) did not support the prosecution case and accordingly, he was declared hostile and was cross examined by the Public Prosecutor. In cross examination, he denied that the appellant had enticed the prosecutrix. However, he admitted that when he came back to his house, then he found that the prosecutrix was missing. He was cross examined by the appellant. In cross examination, he has stated that, at the time of admission of the prosecutrix in the school, the date of birth of the appellant was told by his mother. He further admitted that he is aged about approximately 35 years of age and further stated that apart from his brother, he has 4 sisters and the prosecutrix is the youngest one.

The prosecutrix (P.W.9) has disclosed her age as 15 years. The Trial Court has also assessed the age of the prosecutrix as 15 years. By referring to the evidence of Dr. Sunita Nagesh (P.W.1), it is submitted by the Counsel for the appellant that this witness has admitted that no document was produced regarding the age of the prosecutrix. It also admitted that she has mentioned in her report that the age of the prosecutrix could be in between 18-19 years. She also admitted that no advice was given for ossification test. She further admitted that as the prosecutrix was appearing to be 18 years of age, therefore, she did not advised for

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ossification test.

I have gone through the M.L.C. report, Ex. P.1, of the prosecutrix which was prepared by this witness. In the application for conducting the medical examination, the police had disclosed the age of the prosecutrix as 15 years and Dr. Sunita Nagesh (P.W.1) had also assessed the age of the prosecutrix as 15 years. Although this witness has admitted the suggestion given by the Counsel for the appellant that she has mentioned the age of the prosecutrix in between 18-19 years, but it appears that this witness has made such an admission without there being any document in this regard. This witness has nowhere mentioned in the MLC, Ex.P.1, that the age of the prosecutrix appears to be 18-19 years. Thus, the admission made by this witness is contrary to the documentary evidence i.e., the M.L.C. report, Ex. P.1. Therefore, the admission made by Dr. Sunita Nagesh (P.W.1) cannot be accepted that she had mentioned the age of the prosecutrix in between 18-19 years.

Thus, if the date of birth mentioned in the school admission register is considered, then it is clear that the date of birth of the prosecutrix (P.W.9) was 21-9-1999 and the incident took place on 8-3-2012. Thus, according to the date of birth mentioned in the school admission register, the age of the prosecutrix comes to 12 years and six months on the date of incident, whereas the prosecutrix herself has disclosed her age as 15 years. The police had assessed the age of the prosecutrix as 15 years. Dr. Sunita Nagesh (P.W.1) had assessed the age of the prosecutrix as 15 years and even the Trial Court also assessed the age of the prosecutrix as 15 years. By referring to the evidence of Phool Singh (P.W.3), it is submitted by the Counsel for the appellant that Motilal was the eldest brother, whereas Phool Singh (P.W.3) is the second eldest brother. Phool Singh (P.W.3) has admitted that his age is approximately 35 years. His younger brother Khilan Singh

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might be younger by 2 years. This witness has further stated that he has four sisters and the prosecutrix was the youngest one. When the age difference amongst the siblings was asked, then this witness could not clarify and accepted the suggestion that the age difference between each of his brother and sister might be of 3-4 years. Undisputedly, the prosecutrix and her family belongs to a poor and rustic background. Phool Singh (P.W.3) was also an illiterate person, whereas his mother Smt. Ladhobai was also an illiterate lady. Thus, it is clear that this witness was not in a position to tell the actual age difference amongst the siblings. Thus, in the considered opinion of the Court, the evidence of Phool Singh (P.W.3) is vague and does not throw any light with regard to the age of the prosecutrix. Admittedly, Dr. Sunita Nagesh (P.W.1) did not suggest for ossification test. Thus, it is clear that Dr. Sunita Nagesh (P.W.1) herself had assessed the age of the prosecutrix as 15 years and in the assessment of the Court also, the age of the prosecutrix appeared to be 15 years.

It is next contended by the Counsel for the appellant that Babulal Bhavsar (P.W.4) has stated that in absence of any document pertaining to the age of the child, the affidavit of the guardian is obtained and since there is no affidavit of the guardian of the prosecutrix, therefore, it cannot be said that the date of birth of the prosecutrix (P.W.9) was rightly recorded in the school register, Ex. P/3 and P/4. Considered the submission made by the Counsel for the appellant. The Counsel for the appellant could not bring any provision of law to the notice of the Court, which requires an affidavit of the guardian in absence of any document pertaining to the age of the child. Even no such question was put to Babulal Bhavsar (P.W.4) with regard to the statutory requirement of affidavit. No question was put to Babulal Bhavsar (P.W.4) that if the affidavit of the guardian was the requirement, then why the prosecutrix (P.W.9) was given

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admission in absence of such affidavit. Thus, it appears that out of his own wisdom, Babulal Bhavsar (P.W.4) might be asking for affidavit in absence of any document of age of the child, but that by itself would not vitiate the entry in the school register.

The Counsel for the appellant by relying upon the judgments of the Supreme Court passed in the case of **Sunil Vs. State of Haryana** reported in **(2010) 1 SCC 742**, **Ravinder Singh Gorkhi Vs. State of U.P.** reported in **(2006) 5 SCC 584**, as well as the judgments passed by this Court in the cases of **Ramesh @ Dabbu Vs. State of M.P.**, reported in **2014(III) MPJR 146**, **Arman Ali Vs. State of M.P.** reported in **ILR (2012) MP 2817**, **Rabia Bano Vs. Rashid Khan and another** reported in **(2017) 3 M.P.L.J. (Cri) 649**, **Kalu Vs. State of M.P.**, reported in **2008 (2) MPLJ (Cri) 390**, submitted that as the prosecution has failed to prove that on what basis the date of birth of the prosecutrix was recorded in the school register, therefore, the school admission register, Ex. P.4, cannot be relied upon.

Considered the submission made by the Counsel for the appellant. As already held by this Court, the prosecutrix and her family belongs to a poor and rustic village society. No suggestion was given to either Phool Singh (P.W.3) or Prosecutrix (P.W.9) that any birth certificate was ever obtained with regard to her date of birth or not. The Trial Court, after relying on the school admission register, as well as considering the assessment of age of the prosecutrix by Dr. Sunita Nagesh (P.W.1), assessment of age by the Court as well as the evidence of prosecutrix (P.W.9) in which she has claimed that she is aged about 15 years, has come to the conclusion that the prosecutrix was aged about 12 years and six months on the date of incident and, therefore, held that the prosecutrix was less than 16 years of age on the date of the incident. Under these circumstances, in absence of ossification test, this Court has no option, but to look at the surrounding

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circumstances. It is not a case, where the investigating agency, in spite of the suggestion given by the Doctor, did not conduct the ossification test of the prosecutrix, but in the present case, Dr. Sunita Nagesh (P.W.1) did not suggest for ossification test of the prosecutrix, possibly because of the fact that she had already assessed the age of the prosecutrix as 15 years. Furthermore, the Supreme Court in the case of **Jarnail Singh Vs. State of Haryana** reported in **(2013) 7 SCC 263** has held as under :

19. The first contention advanced at the hands of the learned counsel for the appellant can be conveniently determined from another perspective. The High Court in the impugned order¹ arrived at the conclusion that the prosecutrix VW, PW 6 was a minor at the time of occurrence on 25-3-1993, and had concluded, that even if she had accompanied the appellant-accused Jarnail Singh on 25-3-1993 of her own free consent, and even if she had had sexual intercourse with the accused consensually, the same would be immaterial. For, consent of a minor is inconsequential.

20. During the course of hearing of the present appeal, the learned counsel for the appellant vehemently contested the determination of the High Court in the impugned judgment, wherein it had concluded, that the prosecutrix VW, PW 6 was a minor. Insofar as the instant aspect of the matter is concerned, it was pointed out that the sexual organs of the prosecutrix VW, PW 6 were found to be fully developed by Dr Kanta Dhankar, PW 1. Her hymen was found to be ruptured. It was also seen during the medico-legal examination of the prosecutrix VW, PW 6, that the vagina admitted two/three fingers easily. The learned counsel for the appellant-accused Jarnail Singh also invited our attention to the cross-examination of Dr Kanta Dhankar (PW 1), wherein she acknowledged having mentioned the age of the prosecutrix VW, PW 6 as 15 years, on the basis of the statement made by the prosecutrix to her. Dr Kanta Dhankar, PW 1 had also

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acknowledged that she had not got the ossification test conducted on the prosecutrix VW, PW 6 to scientifically determine the age of the prosecutrix. Based on the aforesaid, it was averred that there was no concrete material on the record of the case, on the basis of which it could have been concluded by the High Court, that the prosecutrix was a minor on the date of occurrence.

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22. 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

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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 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.”

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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.

24. Following the scheme of Rule 12 of the

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2007 Rules, it is apparent that the age of the prosecutrix VW, PW 6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied up to Class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW, PW 6 on the next available basis in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW 4) to prove the age of the prosecutrix VW, PW 6. Satpal (PW 4) was the Head Master of Government High School, Jathlana, where the prosecutrix VW, PW 6 had studied up to Class 3. Satpal (PW 4) had proved the certificate Ext. PG, as having been made on the basis of the school records indicating that the prosecutrix VW, PW 6 was born on 15-5-1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW, PW 6. It would also be relevant to mention that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW, PW 6. The deposition of Satpal, PW 4 has not been contested. Therefore, the date of birth of the prosecutrix VW, PW 6 (indicated in Ext. PG as 15-7-1977) assumes finality. Accordingly it is clear that the prosecutrix VW, PW 6, was less than 15 years old on the date of occurrence i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW, PW 6 had accompanied the appellant-accused Jarnail Singh of her own free will, and had had consensual sex with him, the same would have

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been clearly inconsequential, as she was a minor.

The facts and circumstances of the case are more or less similar to that of the case of **Jarnail Singh (Supra)**.

Considering the facts and circumstances of the case and considering the school register, Ex. P.4, application for admission, Ex. P.3, the assessment made by Dr. Sunita Nagesh (P.W.1), the assessment made by the Court as well as the evidence of prosecutrix (P.W.9), this Court is of the considered opinion that the Trial Court did not commit any mistake in assessing the age of the prosecutrix below 16 years and accordingly, it is held that the prosecutrix (P.W.9) was minor on the date of incident.

The next question for consideration is that whether the prosecutrix was subjected to rape or not?

By referring to the gum insaan report, Ex. P.3, it is submitted by the Counsel for the appellant that although the prosecutrix (P.W.9) has stated that when she came out of the house in order to urinate, she was forcibly taken away by the appellant, but it cannot be accepted, because the prosecutrix (P.W.9) herself has admitted that the house of the appellant is not situated nearer to the house of the prosecutrix. Although the prosecutrix (P.W.9) has stated that when she came out of the house, at that time, the appellant was hiding himself, but it is submitted by the Counsel for the appellant that when the house of the appellant was not situated nearer to the house of the prosecutrix, then it was unnatural that the appellant would stay there in the night with the hope and belief that the prosecutrix (P.W.9) might come out of the house. It is submitted that in the gum insaan report, Ex. P.3, lodged by Phool Singh (P.W.3), he has stated that when he came back to his house, then he was told by his mother that the prosecutrix has gone somewhere without informing anybody. Furthermore, the prosecutrix (P.W.9) is said to have stayed with the appellant for a period of 2 days and during this period, she did

not raise any alarm or did not offer any resistance, which clearly show that she was not kidnapped and she went along with the appellant on her own. It is further submitted that under these circumstances, absence of the injuries on the body of the prosecutrix would assume importance.

Even if the submissions made by the Counsel for the appellant are accepted, still no weightage can be given, because this Court has already come to a conclusion that the prosecutrix was minor, being less than 16 years of age on the date of incident. Under these circumstances, the consent of the prosecutrix would be immaterial.

Furthermore, it is undisputed that the prosecutrix was a spinster at the time of incident, however, human semen and sperms were found on the vaginal slide and cloths of the prosecutrix as per F.S.L. report, Ex. P.13.

According to the prosecution case, the prosecutrix (P.W.9) was recovered from the house of the appellant on 10-3-2012 and the recovery memo, Ex. P.6, was prepared. Yogendra Dubey, (P.W.5) has stated that he had recovered the prosecutrix (P.W.9) from the house of the appellant on the oral information given by Phool Singh (P.W.3) and the recovery memo is Ex. P.6. By referring to Para 9 of the evidence of Laxman Anuragi (P.W.8), it is submitted by the Counsel for the appellant that Laxman Anuragi (P.W.8) has stated that the prosecutrix was recovered by Yogendra Dubey (P.W.5) from her house only, therefore, the recovery of the prosecutrix from the house of the appellant is false.

Considered the submissions made by the Counsel for the appellant. In the present case, the prosecutrix (P.W.9) has been recovered by Yogendra Dubey (P.W.5) and no suggestion was given to him that the prosecutrix (P.W.9) was recovered from her own house. As the prosecutrix (P.W.9) was recovered by

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Yogendra Dubey (P.W.5) and since no suggestion was given to him that the prosecutrix (P.W.9) was recovered from her own house, therefore, no weightage can be given to the statement of Laxman Anuragi (P.W.8) that the prosecutrix was recovered by Yogendra Dubey (P.W.5) from her own house.

The prosecutrix (P.W.9) has been examined in detail. She has firmly stated that she was raped by the appellant. When the prosecutrix (P.W.9) was recovered from the house of the appellant, then she was immediately sent for medical examination and in the vaginal slide and underwear, human sperms and semen were found, as per F.S.L. Report, Ex. P.13. Thus, it is clear that the prosecutrix was subjected to physical relation. As already held by this Court that since the prosecutrix (P.W.9) was minor being less than 16 years of age, therefore, it is not necessary to consider that whether the prosecutrix was a consenting party or not, because where the prosecutrix is minor, then the consent becomes immaterial.

The Supreme Court, in the case of **Jarnail Singh (Supra)** has held as under :

24. Accordingly it is clear that the prosecutrix VW, PW 6, was less than 15 years old on the date of occurrence i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW, PW 6 had accompanied the appellant-accused Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.

It is next contended by the Counsel for the appellant that the father and mother of the prosecutrix have not been examined, therefore, it gives deep dent to the prosecution story.

Considered the submission made by the Counsel for the

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appellant. From the list of witnesses, as cited by the prosecution, it is clear that neither the father nor the mother of the prosecutrix were made witnesses. Thus, it appears that the father of the prosecutrix might have expired, even prior to the incident, and the mother of the prosecutrix might have expired before filing of the charge-sheet. Therefore, under this circumstance, it was obligatory on the part of the appellant to put a question either to the prosecutrix or to the investigating officer, as to why at least the mother of the prosecutrix has not been made a witness. Since no such question was put, therefore, this Court is of the considered opinion that non-examination of the parents of the prosecutrix, in the present case, would not be of much importance.

Thus, this Court is of the considered opinion that the prosecution has succeeded in establishing that the prosecutrix (P.W.9) was below 16 years of age on the date of incident and she was raped by the appellant. Accordingly, the appellant is held guilty of committing offence under Section 376 of I.P.C.

So far as the offence under Section 363 of I.P.C. is concerned, undisputedly, the prosecutrix (P.W.9) was below 16 years of age and the appellant had taken the prosecutrix (P.W.9) out of the keeping of lawful guardian of the prosecutrix. According to the prosecutrix (P.W.9), when she came out of her house, she was forcibly taken away by the appellant. No suggestion was given to the prosecutrix that without there being any inducement on the part of the appellant, the prosecutrix had gone along with the appellant on her own. Thus, it is clear that where an accused either takes away the minor or entices the minor, for taking away from the keeping of the lawful guardian, then the offence under Section 363 of I.P.C., as defined under Section 361 of I.P.C., would be made out. In the present case, there is nothing on record that without any compulsion or inducement, the prosecutrix (P.W.9) went along with the appellant on her own. Thus, this Court

is of the considered opinion that the prosecution has succeeded in establishing that the prosecutrix (P.W.9) was kidnapped by the appellant. Accordingly, the appellant is also held guilty for committing offence under Section 363 of I.P.C.

So far as the question of sentence is concerned, the minimum sentence provided for offence under Section 376 of I.P.C. is rigorous imprisonment of 7 years and the Trial Court has awarded the minimum jail sentence. Accordingly, the sentence awarded by the Trial Court does not call for any interference.

Accordingly, the judgment and sentence dated 5-3-2013 passed by A.S.J., Ganjbasoda, Distt. Vidisha in S.T. No.192/2012 is hereby affirmed.

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

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

(G.S. Ahluwalia)
Judge

Arun*

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[Golu alias Dhaniram Vs. State of M.P.]

**HIGH COURT OF MADHYA PRADESH, JABALPUR,
BENCH AT GWALIOR**

Criminal Appeal No.210/2013

.....Appellant: Golu alias Dhaniram

Versus

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

JUDGMENT post for 04/10/2018

(G.S. Ahluwalia)
Judge
03/10/2018