HIGH COURT OF MADHYA PRADESH

BENCH GWALIOR

SINGLE BENCH:

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

Criminal Appeal No. 243/2015

.........Appellant: **Babalu @ Jagdish**

Versus

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

None for the appellant.

Shri S.N. Seth, Public Prosecutor for the respondent/State.

Date of hearing : 27/07/2019

Date of Judgment : 09/08/2019

Whether approved for reporting: Yes

Law Laid down :

Significant paragraph numbers:

J U D G M E N T

(09/08/2019)

This criminal appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 19.3.2015 passed by First Additional Sessions Judge, Vidisha District Vidisha in S.T.No.33/2013 by which the appellant has been convicted for the following offences:

Section	Act	Imprisonment	Detail of fine/if deposited	Imprisonment in lieu of fine
363	IPC	7 Years RI	Rs.1000/-	2 months SI
366	IPC	7 Years RI	Rs.1000/-	2 months SI
376	IPC	No separate sentence in the light of Section 71 of Cr.P.C.		
6	POCSO Act	10 Years RI	Rs.2000/-	2 months SI

2. On 22.5.2018, 23.5.2018, 25.5.2018 and 22.6.2019 none had appeared to argue the matter. Accordingly, by order dated 22.6.2019 Shri Mayank Bajpai was appointed as a counsel from Legal Aid and he was requested to prepare the matter and argue the same on the next date. However, on 27.7.2019 when the case was called even Shri Mayank Bajpai did not appear before the Court. Accordingly, Shri Prabhakar Kushwah who is in the list of Legal Aid Services Authority was appointed as *amicus curiae* and after going through the record he argued the matter in detail, and the case was reserved for judgment. Thereafter, on 31.7.2019 Shri Gaurav Mishra, the original counsel for the appellant made a prayer that it was his mistake in not appearing before the Court when the case was called for final arguments, therefore, prayed for permission to file written arguments. Permission was granted in the interest of justice and, accordingly on 2.8.2019, the written arguments have been filed. Thus this appeal shall be decided after considering the submissions made by Shri Prabhakar Kushwah as well as the grounds raised in the written arguments.

3. The necessary facts for the disposal of the present appeal in short are that on 2.2.2013 at about 9:30 in the morning the appellant kidnapped the prosecutrix who was minor below the age of 18 years and took her to different places like Bhopal, Raisen, Sagar, Delhi and Phagwada and committed rape on her. On 2.2.2013, the complainant Smt. Guddi Bai lodged a Gum Insan Report on the allegation that her daughter/prosecutrix was doing the household work and thereafter she informed that she is going to the shop for purchasing goods and also informed that Neha Bhabhi is calling her. When the prosecutrix did not return back, then the complainant enquired from Neha as to why she had called the prosecutrix, then the complainant was informed by Neha that she had never called the prosecutrix and thus it was alleged that the prosecutrix has left without informing her and she has taken away an amount of Rs.15,000/- with her. A Gum Insan Report was lodged. During the enquiry, the prosecutrix was recovered. She was sent for medical examination. Spot map was prepared. The appellant was arrested and, accordingly, the police after completing the investigation, filed the charge sheet for offence under Sections, 363, 366, 376 of IPC and under Section 3/4 of POCSO Act, 2012.

4. The Trial Court by order dated 17.8.2013 framed charges under Sections 363, 366, 376 of IPC and under Section 6 of POCSO Act, 2012.

5. The appellant abjured his guilt and pleaded not guilty.

6. The prosecution in order to prove its case examined, Dr. Rashmi Singhai (PW-1), Smt. Rani Nindane (PW-2), Guddi Bai (PW-3),

Rajkumar (PW-4), Prosecutrix (PW-5), Shridhar Chanderiya (PW-6), Than Singh (PW-7), Dr. B.L. Arya (PW-8), Bhanu Pathak (PW-9), Udai Singh (PW-10), Rambabu Goswami (PW-11), Puja (PW-12), Raghuvir Prasad Sharma (PW-13), Lakhanlal Yadav (PW-14) and Usha Paravi (PW-15).

7. The appellant did not examine any witness in his defence.

8. The Trial Court by impugned judgment convicted the appellant for offence under Section 363, 366, 376 of IPC and under Section 6 of POCSO Act, 2012 and since the offence under Section 376 of IPC and Section 6 of POCSO Act are same in nature, therefore, in the light of Section 71 of IPC, no separate sentence was awarded for offence under Section 376 of IPC.

9. Challenging the judgment and sentence passed by the Court below, it is submitted by the counsel for the appellant that the prosecutrix was major and she was a consenting party. The prosecution has not proved the school record of the prosecutrix in accordance with law. The prosecutrix had moved along with the appellant from one place to another but she never made any complaint to anybody. It is further submitted that it is clear from the Gum Insan Report itself that the prosecutrix had left the house with an amount of Rs.15,000/- and, therefore, it is clear that the prosecutrix was major and consenting party. It is further submitted that the Trial Court has committed a material illegality by ignoring the fact that the Criminal Amendment Act, 2013 was published in the Gazette on 2.4.2013 and came into force with

retrospective effect from 3.2.2013 whereas the alleged offence is said to have been committed on 2.2.2013, therefore, the provisions of Criminal Amendment Act, 2013 would not apply to the facts of the case. It is further submitted by the counsel for the appellant that since the appellant is in jail for a sufficient period and has learnt his lesson, therefore, the jail sentence may be modified for the period already undergone by the accused. It is further submitted that since the appellant has married the prosecutrix, therefore, the sexual intercourse or sexual act by a man with his own wife who is 15 years of age, is not rape. Thus if the age of the prosecutrix is accepted to be 15 years and 21 days, then also in view of the marriage of the appellant with the prosecutrix, the appellant cannot be held to be liable for committing an offence under Section 376 of IPC.

10. It is further submitted that the Supreme Court in the case of **State of H.P. vs. Mango Ram** reported in **(2000) 7 SCC 224** has taken the lenient view.

11. *Per contra,* it is submitted by the counsel for the State that the appellant has relied upon the affidavit of the prosecutrix as well as marriage deed Ex.D/3 to show that the appellant had married the prosecutrix. No other document has been filed to show that the marriage was performed in accordance with Hindu Law. It is further submitted that the prosecutrix was minor and, therefore, even if she is held to be a consenting party, then her consent is immaterial and the Trial Court has rightly convicted the appellant for offence mentioned above.

12. Heard the learned counsel for the parties.

13. Prosecutrix (PW-5) has stated that about 10 months back, she was scolded by her mother on the question of household work which was over heard by her friend Puja who informed the appellant about the scolding. Thereafter, Puja informed the prosecutrix that the appellant has called her on his shop and when she went to the shop of appellant, he by show of knife, forced her to sit in a auto. Thereafter they went to Bhopal by bus and stayed in the house of the friend of the appellant. Puja informed the appellant that her brother is coming, therefore, they went to Raisen and from Raisen, they went to Sagar. At Sagar the prosecutrix had requested the appellant that he should not keep with him but at the point of knife, she was threatened. Thereafter they went to Delhi where the appellant forcibly married her. The appellant was informed by his family members that the brother of the prosecutrix is coming to Delhi, therefore, the appellant took her to Phagwada (Punjab). Even in Phagwada he had raped her from 4-5 times. Thereafter, she and the appellant were recovered by the police from Phagwada. It was further stated that her age is 15 years. The recovery memo is Ex.P/6. She was sent for medical examination and thereafter she was handed over to her parents and the custody memo is Ex.P/7. She has further stated that she had studied upto Class-3 in Maharani Avantibai School and she has left the studies about two years back. This witness was cross-examined in detail and certain omissions and contradictions in the police case diary statement was confronted. The entire cross-examination was done to prove that the prosecutrix was a consenting party, however, no cross-

examination was done on the question of age of the prosecutrix except omission in case diary statement whereas she had specifically stated in her examination-in-chief that she is 15 years of age.

14. Guddi Bai (PW-3) is the mother of the prosecutrix. She has stated that on the date of the incident the prosecutrix was aged about 15 years. The prosecutrix was cleaning the utensils. Thereafter she went out of the house on the pretext of taking goods from the shop but thereafter did not return back. In cross-examination, she admitted that the age of her eldest son is 25 years but denied that Kamal is younger to Rajkumar by 2 years. She on her own stated that Kamal is younger by 5 years. She further denied that the prosecutrix is one year younger to her second son Kamal but she stated that the prosecutrix is 5 years younger to Kamal. She further stated that she had not got the horoscope of the prosecutrix prepared but stated that she had obtained the birth certificate from Municipal Council. She further admitted that the birth certificate was not handed over to the police because the same was not demanded. When the police personnel came to know about the whereabouts of the prosecutrix, then they went to Phagwada along with this witness, however she could not narrate the model of the vehicle in which they had gone. She further stated that her son was also accompanying them. The prosecutrix was taken to Civil Line Police Station. She further denied that the prosecutrix had gone there out of her own will.

15. Raj Kumar (PW-4) has also stated about the fact that the prosecutrix went missing and thereafter she was recovered from

Phagwada (Punjab). He has further stated that at the time of leaving the house, the prosecutrix had taken an amount of Rs.15,000/- with her. The appellant was arrested by arrest memo Ex.P/5 and the recovery memo is Ex.P/6. In cross-examination, this witness fairly conceded that the date of birth of his parents was not known. He also expressed his ignorance about date of marriage of his parents. He further admitted that he is aged about 25 years and his brother Kamal is younger by five years. He further stated that the prosecutrix is aged about 15 ½ years. The police had informed that the prosecutrix is in Phagwada, however could not disclose the source of such information to the police. He also could not disclose the model of the vehicle in which they had gone to Punjab.

16. Shridhar Chanderiya (PW-6) is the scribe of Gum Insan Report Ex.P/4.

17. Than Singh (PW-7) has proved the school record of the prosecutrix. As per the admission register of the prosecutrix, her date of birth is 12.1.1998. The copy of the admission register is Ex.P/8C and the certificate Ex.P/9 has been issued by this witness in the capacity of Headmaster Maharani Avantibai School Sagar Road, Vidisha, according to which also, the date of birth of the prosecutrix is 12.1.1998. In cross-examination, this witness has admitted that it is not mentioned in the school admission register that on what basis the date of birth of the child was recorded. He also denied that he had prepared the forged certificate Ex.P/9 under the pressure of the police.

18. Dr. B.L. Arya (PW-8) had medically examined the appellant and

his MLC report is Ex.P/9 and he has found potent.

19. Dr. Rashmi Singhai (PW-1) had medically examined the prosecutrix and her MLC report is Ex.P/1 and no external injury was seen over the private part. The hymen was ruptured and healed. No tear or laceration was present. The prosecutrix was medically examined on 1.5.2013 and according to her, the last intercourse was done on 27.4.2013. Two vaginal slides and panty of the prosecutrix were prepared. Articles were sealed. The requisition for MLC is Ex.P/1A. The sealed articles were sent to FSL and according to the FSL report, human sperms were found on the panty and vaginal slides of the prosecutrix. The FSL report is Ex.P/2.

20. Rambabu Goswami (PW-11) had recovered the prosecutrix from the custody of the appellant at Phagwada on 29.4.2013 and recovery memo is Ex.P/5.

21. Puja (PW-12) has not supported the prosecution case.

22. Raghuvir Prasad Sharma (PW-13) had seized the sealed two slides, one panty and one seal specimen sent by District Hospital, Vidisha by seizure memo Ex.P/3.

23. Lakhanlal Yadav (PW-14) has stated that the underwear and the slides of the appellant along with seal specimen were seized by seizure memo Ex.P/10.

24. Before considering the fact that whether the prosecutrix was a consenting party or not, it is necessary to consider the age of the prosecutrix. The prosecutrix (PW-5) has specifically stated in her

examination-in-chief that she is 15 years of age and she was not cross-examined by the defence on this issue.

25. Guddi Bai (PW-3) has stated that the prosecutrix is 15 years of age and the age of her eldest son is 25 years and age of her second son is 20 years and the age of prosecutrix is 15 years. The evidence of Rajkumar (PW-4) is also on the same line. As per the school record Ex.P/8C, the date of birth of the prosecutrix has been mentioned as 12.1.1998 and, accordingly, the school certificate Ex.P/9 was also issued by Rambabu Goswami (PW-11), the Headmaster of Maharani Avantibai School, Sagar Road, Vidisha. The incident of kidnapping had taken place on 2.2.2013. Thus it is clear that the prosecutrix was 15 years and 21 days on the date of the incident.

26. It is submitted by the counsel for the appellant that the prosecution has failed to prove that on what basis the date of birth of the prosecutrix was recorded as 12.1.1998 in the school record.

27. The submission made by the counsel for the appellant cannot be accepted. At the time of the admission of the prosecutrix in the school, nobody had anticipated that such an incident would take place and, therefore, there was no reason for the parents of the prosecutrix to record a wrong date of birth.

28. The Supreme Court in the case of **Jarnail Singh Vs State of Haryana** reported in **(2013) 7 SCC 263** has held as under :

> **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 aforestated 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.
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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—
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> > (*a*)(*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
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> > (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
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> > (*iii*) the birth certificate given by a corporation or a municipal authority or a panchayat;
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> > (*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."

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 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.

The Supreme Court in the case of **State of Chhattisgarh Vs. Lekhram** reported in **(2006) 5 SCC 736** has held as under :

> **12.** A register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of Section 35 of the Evidence Act. Such dates of births are recorded in the school register by the authorities in discharge of their public duty. PW 5, who was an Assistant Teacher in the said school in the year 1977, categorically stated that the mother of the prosecutrix disclosed her date of birth. The father of the prosecutrix also deposed to the said effect.
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> **13.** The prosecutrix took admission in the year 1977. She was, therefore, about 6-7 years old at that time. She was admitted in Class I. Even by the village standard, she took admission in the school a bit late. She was married in the year 1985 when she was evidently a minor. She stayed in her in-laws' place for some time and after the "*gauna*" ceremony, she came back. The materials on record as regards the age of the prosecutrix were, therefore, required to be considered in the aforementioned backdrop. It may be true that an entry in the school register is not conclusive but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix.

> **14.** Only because PW 3 the father of the prosecutrix could not state about the date of birth of his other children, the same, by itself, would not mean that he had been deposing falsely. We have noticed hereinbefore, that he, in answer to the queries made by the counsel for the parties, categorically stated about the year in which his other children were born. His statement in this behalf appears to be consistent and if the said statements were corroborative of the entries made in the register in the school, there was no reason as to why the High Court should have disbelieved the same. We, therefore, are of the opinion that the High Court committed a serious error in passing the impugned judgment. It cannot, therefore, be sustained. It is set aside accordingly.

The Supreme Court in the case of **Murugan VS. State of T.N.** **r**eported in **(2011) 6 SCC 111** has held as under :

> **24.** The documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. (Vide *Umesh Chandra* v. *State of Rajasthan* and *State of Bihar* v. *Radha Krishna Singh*.)
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> **25.** This Court in *Madan Mohan Singh* v. *Rajni Kant* considered a large number of judgments including *Brij Mohan Singh* v. *Priya Brat Narain Sinha*, *Birad Mal Singhvi* v. *Anand Purohit*, *Updesh Kumar* v. *Prithvi Singh*, *State of Punjab* v. *Mohinder Singh*, *Vishnu* v. *State of Maharashtra* and *Satpal Singh* v. *State of Haryana* and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases.
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> **26.** In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3-1984; registration was made on 5-4-1984; registration number has also been shown; and

names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW 15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable.

The Supreme Court in the case of **Mukarrab v. 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:
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> > "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."
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> 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.
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> [Ref.: *Gray H. Gray's Anatomy*, 37th Edn., Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];
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> 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];
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> * * *
>
> 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. Thus if the evidence regarding age of prosecutrix as led by the prosecution is considered in the light of the above mentioned judgment, then it is clear that when the school record of the prosecutrix is reliable, then it is not necessary to look for any other evidence. Accordingly, it is held that the school admission register of the prosecutrix Ex.P/8C and the certificate Ex.P/9 issued by Rambabu Goswami (PW-11) on the basis of the school record are reliable and credible. Accordingly, it is held that the date of birth of the prosecutrix is 12.1.1998 and since the incident had taken place on 2.2.2013, therefore, it is held that since the prosecutrix was 15 years and 21 days and, therefore, she was minor.

30. It is next contended by the counsel for the appellant that since the appellant and the prosecutrix had married, therefore, in view of Exception 2 to Section 375 of IPC, it cannot be said that the appellant has committed rape on the prosecutrix.

31. The submission made by the counsel for the appellant is misconceived.

32. The Supreme Court in the case of **Independent Thought vs. Union of India & Anr.** reported in **(2017) 10 SCC 800** has struck down "Exception 2 to Section 375" of IPC. Thus the above-mentioned submission made by the counsel for the appellant cannot be accepted for

the reason that Exception 2 to Section 375 of IPC has already been struck down by the Supreme Court. Furthermore, the appellant has relied upon the affidavit of the prosecutrix as well as Notarized marriage deed executed on 23.4.2013 at New Delhi. According, to this marriage deed, the parties had already married with each other on 23.4.2013 itself according to Hindu rites and customs. However, no evidence has been led by the appellant to substantiate that they have performed their marriage as per Hindu rites and customs. If the marriage was already performed as per Hindu customs, then there was no need for the appellant to execute the marriage deed. Furthermore, the marriage is not a contract under the Hindu Law.

33. In view of the fact that Exception 2 to Section 375 of IPC has already been struck down, therefore, it is not necessary to deal with this matter in detail. It is suffice to hold that the prosecutrix was 15 years and 21 days old on the date of her kidnapping, therefore her consent is immaterial and thus it is not required to consider that whether the prosecutrix was a consenting party or not ? The prosecutrix was recovered from the custody of the appellant from Phagwada by recovery memo Ex.P/6. The appellant in his statement under Sections 363 and 313 of Cr.P.C. has admitted that they had gone to Punjab.

34. Thus in view of the recovery memo Ex.P/6 as well as the evidence of the prosecutrix (PW-5) as well as the admission made by the appellant in his statement under Section 313 of Cr.P.C. it is clear that the prosecutrix was recovered from the custody of the appellant on 1.5.2013.

As per the FSL report Ex.P/2 human sperms were found on the vaginal slide as well as panty of the prosecutrix. Thus the ocular evidence of the prosecutrix finds full corroboration from the scientific evidence.

35. So far as the contention of the counsel for the appellant that the offence was committed on 2.2.2013 and the Criminal Amendment Act, 2013 came into force w.e.f. 3.2.2013, therefore, the Trial Court has wrongly applied the amended provisions of Section 376 of IPC is concerned, the same is misconceived. The appellant has been convicted under Section 6 of POCSO Act also. The POCSO Act, 2012 came into force w.e.f. 14.11.2012.

36. Accordingly, the submission made by the counsel for the appellant is hereby rejected.

37. It is held that the appellant is guilty of committing an offence under Sections 363, 366, 376 of IPC and under Section 6 of POCSO Act, 2012. The Trial Court has not awarded separate sentence for offence under Section 376 of IPC. The minimum sentence for offence under Section 6 of POCSO Act is 10 years. Under these circumstances, the sentence awarded by the Trial Court does not require any interference. Consequently, the judgment and sentence dated 19.3.2015 passed by First Additional Sessions Judge, Vidisha District Vidisha in S.T.No.33/2013 is hereby upheld.

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

(G.S. AHLUWALIA)
Judge
09/08/2019

(alok)