

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ATUL SREEDHARAN

ON THE 27th OF MARCH 2023

CRIMINAL APPEAL No. 4693 of 2021

BETWEEN: -

**VIJAY @ CHEEKU S/O HARNARAYAN CHHARI,
AGED ABOUT 21 YEARS, R/O-VILLAGE
HAMIRPUR POLICE STATION CIVIL LINE
DISTRICT DATIA (MADHYA PRADESH)**

.....APPELLANT

(NONE PRESENT)

AND

**THE STATE OF MADHYA PRADESH THROUGH
POLICE STATION CIVIL LINES DISTRICT DATIA
(MADHYA PRADESH)**

... RESPONDENT

(BY SHRI A.P.S. TOMAR – PANEL LAWYER)

This appeal coming on for hearing this day, the court passed the

following:

ORDER

None present for the appellant as the counsel for the appellant has abstained from work on account of the call given by the State Bar Council.

2. The prosecutrix is present in person along with her youngest child.

She is married to the appellant. The appellant is in jail since his conviction by the Ld. Trial Court.

3. Today matter is listed for orders on I.A. No.18472/2022 for suspension of sentence. Earlier, two applications for suspension of sentence have already been dismissed on merits vide order dated 06.01.2022 and 27.06.2022. Learned counsel for the State has prayed that the application may be dismissed as there is no change in circumstances.
4. This court asked the prosecutrix what she has to say about the case as she has appeared in person. The prosecutrix says that she has studied up to Class 7th. Though literate, she cannot read a Hindi Newspaper. She further says that she can only sign her name in Hindi. According to the prosecutrix, from the time the appellant was enlarged on bail pending trial till he was sent to prison to undergo his sentence, the prosecutrix and the appellant had got married and they have three children whose names are Akash aged about six years, Prince aged about four years and Mohit, the youngest, who is about one and half years old. The prosecutrix broke down before this court and stated that she is on the verge of penury as her husband, the appellant herein, is in prison undergoing his sentence. She has also stated that she was compelled by her parents to testify against her husband in the trial. After she married the appellant, her parents have refused to keep her, and her in-laws have given her a room for her stay and have told her that they have done enough for her and

that she should now fend for herself and her three children. She further stated that she has taken debt from several relations just to keep her nose out of the water and does odd jobs like cleaning, cooking, and stitching whenever such work is available and thus ekes out her livelihood with great difficulty. She says that she has no assistance from any quarter. Giving due consideration to the distress of the prosecutrix and her dire financial condition, this Court asked the learned counsel for the State if he is prepared to argue the matter finally to which he has consented. Therefore, the I.A No. 18472/2022 for suspension of sentence is dismissed on the grounds of no change in circumstances and the appeal itself is taken on board for final hearing.

5. In the absence of the learned counsel for the appellant, this court on its own has gone through the record of the trial court.
6. Learned counsel for the State has prayed that the appeal be dismissed as the order passed by the learned trial court is well founded, based upon a proper appreciation of facts, and has correctly applied the law to the facts of the case. He further submits that even if the record goes to reflect consent on the part of the prosecutrix, the same is immaterial as the prosecutrix was a minor on the date on which she was taken away by the appellant and subjected to sexual intercourse by the appellant. He has further drawn the attention of this Court to the testimony of the prosecutrix dated 16.09.2015 in which she has supported the case of the prosecution in its entirety and has not been

declared hostile and that statement of the prosecutrix reveals how she was taken away by the appellant and that she was a minor on the date on which the appellant forced her to elope with him along with the assistance of two other co-accused persons and committed the rape with her. He further submits that the prosecutrix had even levelled allegations of rape against other two co-accused persons from which she had resiled subsequently.

7. Learned counsel for the State has also drawn the attention of this court to the DNA report which discloses a perfect match of the DNA isolated from the semen stains found on the panty of the prosecutrix with the DNA of the appellant extracted from his blood sample.
8. Under the circumstance, learned counsel for the State has submitted that the prosecution has been able to prove the charges against the appellant to the hilt and no interference is called for from this Court.
9. Heard learned counsel for the State and perused the record of the learned court below.
10. The incident is of the year 2014. The FIR is registered on 09.05.2014 which is Crime No.87/2014 at Police Station Civil Line, District Datia. The FIR was registered for offences under Sections 363, 366, 506, 34 of the IPC against the appellant and two other co-accused persons. The FIR has been registered by mother of the prosecutrix in which she says that her minor daughter was forcibly taken away from home by the appellant and two other accused persons. The FIR

is Ex. P/1. The appellant was arrested on 13.05.2014 and the prosecutrix was recovered from his custody. The arrest memo is Ex. P/12 and recovery memo of the prosecutrix is Ex. P/-11. The MLC of the prosecutrix is Ex. P/8 and the same is inconclusive about rape. The report does not disclose any kind of external injuries on the body of the prosecutrix, but the doctor has opined that there is a possibility of sexual intercourse. For the purpose of ascertaining the age of the prosecutrix, x-ray was advised by the doctor. Ex-D/7 is the Radiological report dated 26/5/2014 according to which, the age of the prosecutrix as above eighteen years and below nineteen years. Dr. S.C. Gupta is the Radiologist, who has been examined before the learned trial Court as PW/11 who has proved his report Ex-D7.

- 11.** PW/1-Dhanku, is the mother of the prosecutrix, who has supported the case of the prosecution. However, as regards the age of the prosecutrix, she states in para six of her cross-examination that she had stated the age of the prosecutrix before the school authorities on the basis of estimation. She also says that she does not know the months and dates in the Gregorian Calendar.
- 12.** The father of the prosecutrix is Kallu Kushwah, who has been examined as PW/5 before the learned trial Court and he too has supported the case of the prosecution. However, as regards the age of prosecutrix, the witness states in paragraph 7 of his cross-examination, that he is not aware of the date that was recorded in the school register at the time of admitting the prosecutrix in school. He

also says that he is not aware of the date entered in the admission form by the teacher who had filled up the form. He further states that he does not know the date of birth of the prosecutrix.

13. PW/12 is the retired Headmaster of the school in which the prosecutrix has studied till the VII standard. He has proved the entry in the school register which discloses the date of birth of the prosecutrix as 1/5/2000 which would make her a minor on the date she is stated to have eloped with the appellant.
14. Determination of the age of a prosecutrix under the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as the "POCSO") has been considered by the Supreme Court in **Mahadeo Vs. State of Maharashtra and Anr – (2013) 14 SCC 637** wherein, the Supreme Court has laid down that the date given in the matriculation or equivalent certificate must first of all be considered for the purpose of determining the age of the prosecutrix on the date of offence and, if that is not available, other means of determining the age of prosecutrix must be resorted to. While laying down this proposition, the Supreme Court took inspiration from rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (referred hereinafter as "Rules of 2007"). The said rule provided various means of assessing the age of a juvenile in conflict with law. The Supreme Court applied the same parameters for determining the age of a prosecutrix under the POCSO. Under rule 12(3) of the Rules of 2007, the age determination inquiry shall obtain evidence relating

to the age of the juvenile firstly, from the matriculation or equivalent certificates if available [r. 12(3)(a)(i)] and in its absence, the date of birth certificate from the school first attended (other than a play school) [r. 12(3)(a)(ii)], and in its absence, the birth certificate given by a municipality, corporation or a panchayat [r. 12(3)(a)(iii)]. Thereafter, the Supreme Court refers to rule 12(3)(b) and opines that it is only in the absence of any of the means provided in rr. 12(3)(a) (i) to (iii), that medical opinion could be sought to determine the age of the juvenile. Thereafter, the Supreme Court applies the same standard to determine the age of the prosecutrix under POCSO.

15. The question before this Court is whether the judgement of the Supreme Court in Mahadeo *supra* binds all inferior Courts to accept the date of birth of the prosecutrix as entered in the school register as an indelible fact, prohibiting any enquiry into the reliability of such an entry? In **Haryana Financial Corporation and anr., Vs. Jagdamba Oil Mills and Anr – (2002) 3 SCC 496**, the Supreme Court held in paragraph 19 that judgements are not to be interpreted as statutes and the observations of the Courts are not to be assigned the mathematical rigidity of a Euclid's theorem. The observations of the Court are to be understood in the backdrop of the facts in which the judgement was passed.
16. A plain reading of the judgement in Mahadeo *supra* reveals that the Supreme Court had to borrow the means of determining the age of the prosecutrix from the provisions of r.12(3) (i) to (iii) of the Rules

of 2007, on account of the absence of an analogous provision in the POCSO. However, the Supreme Court never intended its opinion to forbid an enquiry by the Courts into the reliability of the date of birth of the prosecutrix, as entered in the school register. Such a view is further sustainable in the light of stringent and draconian provisions in the POCSO which require that the enquiry by the Court to ascertain the guilt of an accused under the provisions of the POCSO should be detailed and intense to ensure that there is no miscarriage of justice by convicting an innocent or acquitting the guilty. The judgement does not require that the Courts consider the date of birth of the prosecutrix entered in the school register as gospel truth.

- 17.** This Court is of the opinion that the date of birth of the prosecutrix entered in the school register must be tested for reliability before its acceptance, based on the source of information upon which, the entry was made in the school register.
- 18.** Undisputedly, the school authorities are ignorant of the date of birth of a student who is brought for admission. There are two sources of information relating to the date of birth of the student entered in the school register. First source of information is the birth certificate of the child issued by the Municipality, Corporation, or the Panchayat or any such other local authority / body, which itself is based upon the certificate given by the hospital where the child was born. The second source of information is the date of birth of the child as given by the parent/guardian. Where the source of information relating to

the date of birth of the child/prosecutrix is the statement of the parent/guardian, the Court must satisfy itself that such parent/guardian has affirmatively stated so in his or her testimony. Where the parent/guardian of the prosecutrix state in their testimony that they do not know the date of birth of the prosecutrix or that, they have given it to the school authorities as an estimation without being sure, then the Court must look for alternate proof relating to the prosecutrix's date of birth as the source of information on the basis of which the date of birth of the prosecutrix was entered in the school register itself was doubtful, and the same does not become reliable only because it has been entered in the school register.

- 19.** In this case, both the mother and father of the prosecutrix in their testimony state emphatically that they are unable to give the date of birth of the prosecutrix. They even state that date of birth has been given to the school authorities on the basis of estimation. Therefore, in this factual backdrop, the date of birth of the prosecutrix entered in the school register on the basis of the information given by the parents of the prosecutrix, is unreliable and does not inspire the confidence of this Court. Ten years of the appellant's life cannot be taken away on the basis of estimation, speculation and guess work relating to the age of the prosecutrix. It is only where the source relating to the date of birth of the prosecutrix is unimpeachable on the basis of which the entry is made in the school register, would the Court feel bound by it and not otherwise. In cases under the POCSO, the age of the prosecutrix is a fact in issue that the prosecution must

prove beyond reasonable doubt to secure the conviction of the accused. In this case, the source of information on the basis of which the date of birth of prosecutrix was entered in the school register is the information given by the parents of the prosecutrix who themselves are unaware of the date of the birth of the prosecutrix.

- 20.** In the aforementioned circumstances, the report of the Radiologist (Ex D/7) which reflects that the prosecutrix was more than eighteen years and below nineteen years as on 26/5/2014 assumes great significance. The said document has been proved by the Doctor S.C. Gupta, who has been examined as PW/11 before the learned trial Court. Therefore, between the school certificate which gives the age of the prosecutrix on the basis of a vague estimation and which this Court considers as unreliable, and the scientific evidence, being the report of the Radiologist which shows the age of prosecutrix as above eighteen years as on 16/5/2014, this Court deems it appropriate, in the interest of justice, to rely upon the latter, which is Ex. D/7 in order to fix the date of birth of prosecutrix. Thus, on the basis of what has been discussed in the preceding paragraphs, this Court holds that the age of the prosecutrix was more than eighteen years on the relevant date.
- 21.** Having so determined the age of the prosecutrix as more than eighteen years, this Court shall now examine whether there was absence of consent on the part of the prosecutrix. In order to assess the same, this Court examined the testimony of the prosecutrix who

has been examined as PW/3. Her testimony was first recorded, on 16/9/2015 and thereafter again on 24/01/2020. On 16/09/15, when the prosecutrix testified for the first time, she supported the case of the prosecution to the hilt in her examination in chief and describes how she was taken from her home by the appellant and two other co-accused persons who committed rape with her. However, in paragraph 5 of her cross examination, all the instances that she has stated in her examination-in-chief are reiterated to the prosecutrix and she was asked if she had told the police also the same facts relating to her abduction and rape to which the prosecutrix states that she had told the police, everything she has stated in her examination-in-chief but however, if the same is not mentioned in her statement to the police under Section 161 of Cr.P.C. (Ex.D/2), she is unable to give any reason. Thus, it is clear that the allegations relating to abduction and rape of the prosecutrix by the appellant is an improvisation by the prosecutrix for the first time before the trial court which is not a part of her previous statement u/s. 161 Cr.P.C.

- 22.** The relevance of this is seen when she is called into the witness box for the second time on 24.01.2020 (as she had to be further examined after the arrest of the co-accused persons who were earlier absconding). Between 2015 and 2020, the prosecutrix states that she married the appellant and bore him two children. In paragraph twelve of her testimony statement given on 24.01.2020, she absolves the co-accused persons entirely of any wrongdoing and also the appellant herein. In paragraph 13, she says that the testimony that

she had given on 16.09.2015 implicating the appellant was under duress of her parents and so she perjured against the appellant. This time round, she absolves the appellant completely and states that she had gone with the appellant willingly and there was no force used by the appellant and that it was a case of wilful elopement. Thereafter, the prosecutor has cross-examined her in the backdrop of her earlier statement given in the year 2015 and in paragraph 14, the prosecutrix reiterates the fact that her entire statement given on 16.09.2015 was under the duress of the parents who wanted to get her married elsewhere and were not willing to accept the appellant herein as a prospective groom for the prosecutrix. Thus, the statement of the prosecutrix clearly reveals that the elopement and cohabitation was consensual, and it was only on account of the intransigence of the parents of the prosecutrix and their unwillingness to accept the appellant as a son-in-law that the case was foisted upon him.

- 23.** In this regard, it is also relevant to refer to Ex. D/7 which is a marriage certificate of the prosecutrix with the appellant on 27.11.2015 showing their marriage at the “Shiva Adarsh Vivah Samiti, Rani Laxmi Nagar, Jhansi (Uttar Pradesh).
- 24.** Under the circumstance, this Court is of the view that the order passed by the learned trial court is not based upon a proper appreciation of the evidence which otherwise reflects that the elopement between the prosecutrix and the appellant was consensual and that the age of prosecutrix, which is in the penumbra of doubt

must be held in favour of the appellant on the basis of Ex.P/7 (Radiological report) supported by the statement of PW/11 (Dr. S.C. Gupta, Radiologist). Thus, this appeal succeeds. The appellant stands acquitted and shall be released forthwith if he is not wanted in any other case.

25. With the above the appeal is finally **disposed of**.

(ATUL SREEDHARAN)
JUDGE

Rashid/JPS/-