

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

ON THE 31st OF MARCH, 2022

CRIMINAL APPEAL No. 1272 of 2016

Between:-

**JITENDRA S/O CHAJJU
AGED ABOUT 19 YEARS
NAHALBEDI MUNDI
DISTT. KHANDWA/INDIRA NAGAR, SANAWAD
TEH. BADWAH
DISTT. KHARGONE (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI BHARAT YADAV, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
STATION HOUSE OFFICER
THRU. P.S. SANAWAD
DISTT. KHARGONE (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI RAJESH JOSHI, GOVERNMENT ADVOCATE FOR STATE)

This appeal coming on for orders this day, Hon'ble Shri Justice Satyendra Kumar Singh passed the following:

J U D G E M E N T

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (2 of 1974) [in short "Cr.P.C."] against the judgement dated 24.08.2016 passed by the Additional Sessions Judge,

Badwah, District Khargone (M.P.) in S.T. No.13/2015, whereby the appellant has been convicted under Sections 363, 366 and 376(2)(i) of the Indian Penal Code (in short "IPC") alongwith Section 3/4 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act") and sentenced him to undergo RI for 2 years with fine of Rs.1,000/-, RI for 3 years with fine of Rs.1,000/-, RI for 10 years with fine of Rs.2,000/- and RI for 7 years with fine of Rs.2,000/ and in default of payment of fine, to undergo additional RI for 1 month, 1 month, 2 months and 2 months respectively.

2. Prosecution story, in brief is as follows :-

(i) On 11.11.2014, at about 16.00 hours, when complainant's minor daughter prosecutrix, aged about 14 years was alone in her house situated at Indira Nagar Bedi, Sanawad, District Khargone, appellant came there and on the false pretext of marriage took her to Moondi, District Khandwa, then to his sister's house at Masangaon and thereafter to Salkanpur on his motorcycle. He kept her there captivated in a dharamshala for four days and committed rape upon her repeatedly. On the same day, when the complainant returned back home, he found the prosecutrix as well as the appellant missing. He searched for them at the nearby places as well as relatives of the appellant and on the next day i.e. on 12.11.2014, at about 18.30 hours, lodged the report against the appellant on the basis of which FIR (Exhibit-P/5) was registered against him at Police Station Sanawad, Khargone for the offences punishable under Sections 363 and 366 of IPC. On the next day i.e. on 13.11.2014 at about 8.10 PM, Investigating Officer S. I. Jitendra Yadav went to the spot and prepared spot map (Exhibit-P/6).

(ii) On 18.11.2014, appellant took the prosecutrix to District Court, Khandwa saying that he will marry her in the Court, where prosecutrix's uncle Deepak and his friend Ganesh saw them. They informed police station Khandwa, who brought prosecutrix as well as

appellant to Police Station Sanawad, where on the same day at about 18.30 hours, prosecutrix was recovered, as per Dastyadi Panchanama (Exhibit-P/1). S.I. Jitendra Yadav recorded the statement of prosecutrix in the presence of her mother. He, after getting the consent vide letter (Exhibit-P/2) of the complainant and his wife, sent prosecutrix to Community Health Centre, Sanawad for her medical examination. On the same day, at about 7.45 PM, Dr. Hansa Patidar medically examined her and prepared MLC report (Exhibit-P/6) stating therein that her 28 tooth were erupted and her hymen was found ruptured. As her menstruation period was going on, she could not prepare her vaginal slides. She sealed her clothes and handed over the same to the concerned police constable. On 22.11.2014, when the prosecutrix was again brought to the Community Health Centre, she prepared her vaginal slides as per MLC report (Exhibit-P/7) and handed over the same to the concerned police constable.

(iii) S.I. Jitendra Yadav seized the vehicle Hero Honda motorcycle bearing registration No.MP12 MG 4384 involved in the alleged crime from the possession of the appellant as per seizure memo (Exhibit-P/12), arrested appellant as per arrest memo (Exhibit-P/13) and sent him to the Community Health Centre, Sanawad for his medical examination, where on 18.11.2014, at about 9.20 PM, Dr. Mubarak Syed medically examined and found him capable of doing sexual acts as per MLC report (Exhibit-P/14) and prepared his semen slides as per MLC report (Exhibit-P/15). S. I. Jitendra Yadav obtained scholar register entry (Exhibit-P/8) and also letter/certificate (Exhibit-P/9) from the Principal, Government Secondary School, Roopkheda with regard to the date of birth of prosecutrix, wherein her date of birth is written as 25.07.2000. He vide letter (Exhibit-P/16) sent the seized articles to FSL, Rau, Indore for chemical examination and after completion of

investigation, filed the charge-sheet before the Court of Additional Sessions Judge, Badwah, District Khargone.

3. Learned Trial Court considering the material *prima-facie* available on record, framed the charges under Sections 363, 366, 376(2)(i) and 376(2)(n) of IPC and also under Section 3/4 of the POCSO Act against the appellant, who abjured his guilt and prayed for trial. In his statement recorded under Section 313 of Cr.P.C., the appellant pleaded his false implication in the matter. In support of his defense, he did not examine any witness.

4. Learned Trial Court after appreciating the oral as well as documentary evidence available on record, acquitted the appellant from charges framed under Section 376(2)(n) of IPC, but found him guilty for the offence punishable under 363, 366 and 376(2)(i) of IPC alongwith Section 3/4 of POCSO Act and sentenced him to suffer as aforementioned. Being aggrieved with the said judgement of conviction and order of sentence, appellant has preferred this appeal for setting aside the impugned judgement and discharging him from the charges framed against him.

5. Learned counsel for the appellant submits that the learned Trial Court has committed a legal error while appreciating the evidence available on record. The prosecution has not produced any document except the scholar register entry (Exhibit-P/8) with regard to the age of the prosecutrix. In the above scholar register, date of birth of the prosecutrix was written on the basis of previous school leaving certificate and the same has also been not produced. Prosecutrix's father and mother both are illiterate and both have admitted in their cross-examination that they are not aware about the date of birth of prosecutrix hence, it is not proved that prosecutrix was minor at the time of incident. Prosecutrix's statement with regard to the incident are not consistent. There are several contradictions and omissions in her statements recorded during trial and statements recorded under Sections 161 and 164 of Cr.P.C. In the aforesaid circumstances, learned Trial Court has committed

legal error in holding the appellant guilty under Sections 363, 366 and 376(2) (i) of IPC alongwith Section 3/4 of POCSO Act, therefore, the impugned judgement of conviction and order of sentence may be set aside and the appellant may be acquitted from the charges framed against him.

6. Per contra, learned Public Prosecutor for the respondent-State, while supporting the impugned judgement of conviction and order of sentence submits that the judgement was passed by the Trial Court after proper appreciation of evidence available on record. Same is well reasoned establishing the guilt of the appellant beyond reasonable doubt. Therefore, confirming the impugned judgement of conviction and order of sentence, the appeal filed by the appellant may be dismissed.

7. I have heard learned counsel for the parties at length and perused the record.

8. Complainant Kamal Verma (PW-4) and his wife Kiranbai (PW-3) deposed that on the date of incident, they went to garden for work leaving their minor daughter prosecutrix alone at their house and when they returned back at about 5.00 PM they did not find the prosecutrix at home. Complainant Kamal Verma (PW-4) deposed that he searched the prosecutrix at nearby places and enquired about her from the people of his locality, then he came to know that appellant took the prosecutrix on motorcycle in his absence. He further deposed that on the next day, he reported the matter to police station Sanawad, District Khargone. S.I. Jitendra Singh Baghel (PW-7) deposed that on the basis of aforesaid report made by the complainant, he registered the FIR dated 12.11.2014 (Exhibit-P-5) against the appellant for the offences punishable under Sections 363 and 366 of IPC. Appellant has not challenged the aforesaid fact seriously, therefore, this fact is established that on the date of incident i.e. 11.11.2014, complainant's daughter prosecutrix was found missing from his house and in this regard, an FIR dated 12.11.2014 (Exhibit-P/5) was registered against the appellant at police station Sanawad.

9. Prosecutrix (PW-1) deposed that appellant is resident of her locality and both were known to each other. She further deposed that on the date of incident at about 4.00 PM, appellant came to her house and got her seated on his motorcycle saying that her father was calling her at garden. She further deposed that appellant took her to Moondi, District Khandwa, then to his sister's house at Masangaon on his motorcycle and kept her there in the night. She further deposed that on the next day, appellant took her to Salkanpur, District Sehore on his motorcycle and kept her there in a dharamshala for 4-5 days. She further deposed that appellant thereafter took her back to Khandwa on his motorcycle where her uncle Deepak saw her and took her to police station Khandwa and then to police station Sanawad. Deepak (PW-10) deposed that when he alongwith his friend Ganesh went to District Court, Khandwa in search of his brother's daughter prosecutrix and when he saw her there with the appellant, he after telephonically informing prosecutrix's mother took the prosecutrix as well as appellant to police station Sanawad. Ganesh (PW-5) has supported his aforesaid statement.

10. S.I. Jitendra Yadav (PW-12) deposed that on 18.11.2014, when prosecutrix was brought at police station Sanawad, he recovered her from the possession of her father i.e. the complainant, as per Dastyadi Panchanama (Exhibit-P/1), sent the prosecutrix to Community Health Centre, Sanawad for medical examination. Dr. Hansa Patidar (PW-8) deposed that on the same day, at about 7.45 PM, she medically examined the prosecutrix and prepared MLC report (Exhibit-P/6) stating therein that her hymen was found ruptured. He further deposed that he seized the motorcycle bearing registration No.MP12-MG-4384 used in the crime from the possession of the appellant, as per seizure memo (Exhibit-P/12), arrested the appellant, as per arrest memo (Exhibit-P/13) and sent him to Community Health Centre, Sanawad for medical examination. Dr. Mubarik Syed (PW-11) deposed that on 18.11.2014, he medically examined the appellant and prepared his MLC

report (Exhibit-P/4) and found his genital parts healthy and capable of doing sexual acts. Nothing material has come up during the cross-examination of above witnesses on the basis of which their aforesaid statements can be doubted or disbelieved. Therefore, this fact is also found established that on the date of incident i.e. 11.11.2014, appellant got seated the prosecutrix on his motorcycle and took her to Moondi, District Khandwa, then to Masangaon at his sister's house and thereafter to Salkanpur where he kept her in a dharamshala for 4-5 days. He then took her to District Court, Khandwa on 18.11.2014 from where on the same day, he alongwith prosecutrix were brought to police station Sanawad.

11. Prosecutrix (PW-1) further deposed that during the aforesaid period i.e. since 11.11.2014 to 18.11.2014, appellant forcefully committed rape upon her, firstly at his sister's house at Masangaon and thereafter near dharamashala at Salkanpur, but in this regard, her statements are not consistent with her earlier statement. She in her earlier statement recorded under Section 161 of Cr.P.C. (Exhibit-D/1) stated that on the date of incident, appellant on the false pretext of marriage got her seated on his motorcycle and took her to Moondi, District Khandwa, then to Masangaon at his sister's house where they stayed for about 20 minutes only. While in her statement recorded during trial, she deposed that appellant got her seated on his motorcycle saying that her father was calling her at garden and took her to Moondi, then to Masangaon at his sister's house and kept her there in the night and forcefully committed sexual intercourse with her. She in her statement recorded under Section 161 of Cr.P.C. nowhere stated that appellant forcefully committed rape upon her at his sister's house at Masangaon. She in para-13 of her cross-examination admitted that at Salkanpur, appellant kept her in a dharamshala, where both slept with other people and appellant did not commit rape upon her there. She in para-14 of her cross-examination specifically deposed that appellant took her towards backside of the dharamshala in the night and after giving threats,

committed rape upon her. From the aforesaid statements of the prosecutrix, it appears that she remained with the appellant since 11.11.2014 to 18.11.2014 i.e. about 7-8 days, until she was recovered, at different places including public places like dharamshala and court premises and was freely moving around with the appellant and during aforesaid period, she was subjected to sexual intercourse also by the appellant and in the course of such movement, she came across many people, yet she did not complain of any criminal act on the part of the appellant.

12. In view of the above, main point of discussion would be the age of the prosecutrix in order to determine as to whether she was major so as to give her consent. In this regard, prosecution has examined prosecutrix's mother Kiranbai (PW-3), father Kamal Verma (PW-4) and Principal, Madhyamik Vidyalaya, Roopkheda Kailash Bhure (PW-6). Kailash Bhure (PW-6) deposed that prosecutrix got admitted in his school in 6th Standard in the year 2012 and as per scholar register entry (Exhibit-P/8), her date of birth is 25.07.2000. He further deposed that in his school scholar register, prosecutrix's date of birth was written on the basis of prosecutrix's earlier school leaving certificate issued from Shaskiya Kanya Prathamik Vidyalaya, Badod. He further deposed that on being asked by the police, a letter/certificate (Exhibit-P/9) was also issued in this regard by his predecessor Ashok Singh Mandloi. As the prosecution has not produced the scholar register entry of Shaskiya Kanya Prathamik Vidyalaya, Badod on the basis of whose school leaving certificate, date of birth of prosecutrix was written as 25.07.2000 in the aforesaid scholar register (Exhibit-P/8). Therefore, the probative value of the aforesaid scholar register is required to be examined, as held by the Apex Court in the case of **Satpal Singh Vs. State of Haryana, (2010) 8 SCC 714.**

13. In the present case, prosecutrix's mother (PW-3) and father (PW-4) although deposed that prosecutrix's age was 14 years at the time of incident

but both of them have fairly admitted in their cross-examination that they are not aware about the date of birth of their children including the prosecutrix. Kamal Verma (PW-4) also admitted that he himself went with the prosecutrix at the time of her admission in the school and on the basis of his assumption, he mentioned her age and got her admitted in the school. In such circumstances, scholar register entry (Exhibit-P/8) is although admissible in evidence under Section 35 of the Evidence Act but the same in itself cannot be taken to be the best piece of evidence as per the decision rendered by the Apex Court in the case of **Satpal Singh (supra)**.

14. In this regard, observations made by learned Trial Court during recording of statements of prosecutrix as well as observations made by Dr. Hansa Patidar during medical examination of prosecutrix are also material and cannot be ignored. Learned Trial Court has observed and written age of the prosecutrix as about 15 years on 13.07.2015 i.e. after about 9 months of the incident. Dr. Hansa Patidar (PW-8) has specifically mentioned in the MLC report (Exhibit-P/6) that during medical examination of prosecutrix, she found her 28 tooth erupted about which she has been cross-examined by the counsel for the appellant. Relevant portion of her MLC report is reproduced as under :-

Dental Form

28 tooth 2122 / 2122
 2122 / 2122

15. As per the *Modi's Medical Jurisprudence and Toxicology*, 23rd Edition, the aforesaid period of eruption of the temporary and permanent teeth are as follows :-

<i>Teeth</i>	<i>Temporary</i>	<i>Permanent</i>
<i>Central incisors</i>	---	<i>6th to 8th year</i>
<i>Lower</i>	<i>6th to 8th month</i>	
<i>Upper</i>	<i>7th to 9th month</i>	

<i>Lateral incisors</i>	---	<i>7th to 9th year</i>
<i>Lower</i>	<i>10th to 12th month</i>	
<i>Upper</i>	<i>7th to 9th month</i>	
<i>Canines</i>	<i>17th to 18th month</i>	<i>11th to 12th year</i>
<i>Anterior Premolars or First Bicuspid</i>	<i>Absent</i>	<i>9th to 11th year</i>
<i>Posterior Premolars or Second Bicuspid</i>	<i>Absent</i>	<i>10th to 12th year</i>
<i>First Molars</i>	<i>12th to 14th month</i>	<i>6th to 7th year</i>
<i>Second Molars</i>	<i>20th to 30th month</i>	<i>12th to 14th year</i>
<i>Third Molars or Wisdom teeth</i>	<i>Absent</i>	<i>17th to 25th year</i>

16. From the aforesaid table, it is apparent that second molars erupt between 12th to 14th year while third molars are wisdom teeth and are erupted between 17th to 25th year. As per statement of Dr. Hansa Patidar (PW-8) and MLC report (Exhibit-P/6) prepared by her, only 28 tooth of prosecutrix were found erupted, meaning thereby, her third molars were not erupted. In the aforesaid circumstances, taking into consideration the observation of learned Trial Court, it can be easily concluded that although prosecution has failed to prove her age to be below 16 years at the time of incident but it has been proved that she was below 17 years at the time of incident.

17. In the present case, incident took place on 11.11.2014 and at that time, the provisions of the Criminal Law Amendment Act, 2013 were enforced and in view of the amended clause 6 of Section 375 of IPC, sexual intercourse with a girl below 18 years was an offence, no matter whether girl consented or not consented to sexual intercourse. Since prosecutrix was below 18 years at that time, therefore, it is clear that she was not competent to give her consent at the time of incident.

18. In view of the aforesaid discussion, as the prosecution could not prove

its case beyond reasonable doubt that prosecutrix was below 16 years of age at the time of incident, therefore, appellant's conviction under Section 376 (2) (i) of IPC is not sustainable and the same is liable to be modified and converted into Section 376(1) of IPC. Findings with regard to rest of the offences is liable to be affirmed as learned Trial Court has not committed any error in finding the appellant guilty for the offences punishable under Sections 363 and 366 of IPC as also under Section 3/4 of the POCSO Act.

19. In view of aforesaid discussion, appeal succeeds and stands **partly allowed** and the judgement of conviction and order of sentence is modified to the following extent :-

*The judgement and order of conviction dated 24.08.2016 passed by the Additional Sessions Judge, Badwah, District Khargone (M.P.) in S.T. No.13/2015 is modified and converted into Section 376(1) of IPC in place of Section 376(2)(i) of IPC and considering the conduct of the prosecutrix and also provisions of Section 376 of IPC enforced at the time of incident, the sentence awarded to the appellant for the aforesaid offence is reduced from RI for 10 years to RI for 7 years. The sentence regarding the amount of fine shall remain intact. In default of payment of fine, to further undergo additional RI for 2 months. **As per available record, appellant is in jail since 18.11.2014 and he has already undergone the substantial period of more than 7 years.** Learned Trial Court is directed to ascertain the period of jail incarceration suffered by the appellant from the concerned jail and thereafter he be set at liberty if he is not required in any other case. For rest of the offences punishable under Sections 363 and 366 of IPC alongwith 3/4 of the POCSO Act, the order of conviction and sentence of*

the appellant is hereby affirmed.

19. The Registry is directed to send back the Trial Court record forthwith alongwith copy of this judgement. Let a copy of this order be also sent to the concerned jail authorities for its speedy compliance and necessary action.

Certified copy as per rules.

(Satyendra Kumar Singh)
Judge

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