



**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

ON THE 24th OF September, 2024

CRIMINAL APPEAL No.2095/2020

***Mohammad Ali
VS.
State of M.P***

***(MS.VIBHA BHARUKA, - ADVOCATE FOR APPELLANT APPOINTED BY THE
LEGAL AID SERVICES AUTHORITY)
(SHRI APOORV JOSHI- ADVOCATE FOR RESPONDENT)***

JUDGEMENT

- 1] Since no one has appeared on behalf of the appellant, this Court has appointed Ms.Vibha Bharuka, learned counsel as *Amicus Curiae* to assist this Court appointed by the Legal Aid Services Authority.
- 2] Appellant is absconding, be that as it may, the appeal is to be heard finally and cannot be kept pending because the accused is absconding. The appellant was in jail during trial from 30.3.2014 to 1.12.2014, and after his conviction, he remained in jail from 12.2.2020 to 29.03.2022, and as such he has completed two years, nine months and 18 days of incarceration.
- 3] This criminal appeal has been filed under Section 374 of Cr.P.C. against the judgment dated 12.2.2020 passed by the I Additional Sessions Judge, Manasa, District Neemuch in S.C.No.22/2014; whereby finding the appellant guilty, the learned Judge of the trial Court has convicted him as under:-



Conviction		Sentence		
OFFENCE	ACT	IMPRISONMENT	FINE	IN DEFAULT
363	IPC	3 YEARS R.I	RS.500/-	4 MONTH
366	IPC	4 YEARS R.I	RS.700/-	5 MONTH
506	IPC	1 YEAR R.I	Rs.200/-	2 MONTH
5(L)/6	POCSO	10 YEARS R.I	Rs.800/-	6 MONTH

4] In brief, the facts of the case are that the prosecutrix aged around 16 years was studying in class 9th and was know to the present appellant, aged 28 years, who was a *Tantrik*. On the date of incident, i.e, 29.3.2014, while the prosecutrix was coming from her school in the noon, she got abducted by the appellant. The FIR of the incident was lodged on 30.3.2014 by Hariom, the uncle of the prosecutrix, alleging that the appellant had abducted his niece. After the FIR was lodged, the investigation ensued, and subsequently, after filing of the charge-sheet, the learned Judge of the trial Court, after appreciating the evidence adduced by the parties on record, has convicted the appellant as aforesaid. Hence, this appeal.

5] Counsel for the appellant has submitted that the age of the prosecutrix has not been proved positively to be less than 16 years and apart from that, the FSL report (Ex.P-1) is negative as the prosecutrix had resided with the appellant for three days, hence she was consenting a party. Thus, it is submitted that the appeal may be allowed.

6] Counsel for the respondent/State on the other hand has opposed the prayer, and it is submitted that it is clear case of



kidnapping and rape, and thus, no case for interference is made out.

7] Heard. Having considered the rival submissions and on perusal of the record, it is found that so far as the victim (PW-1) is concerned, she has stated her age to be 16 years, and has stated that as she was having a headache, her mother had asked her to tie a thread from the appellant, who was a Tantrik (practicing black magic). On 29.3.2014, when the prosecutrix was coming back from school, the appellant sent one Baliya and her son Wasim on a motorcycle, who told her that appellant is calling her and after threatening her, they took her to the appellant's house where appellant met her and told her that he wants to marry her, and that if she does not marry him, he would kill her, and at that time appellant also slapped her and raped her, he also kept the entire day. Thereafter, the appellant also called a maruti car and took her to Baswada to his sister Farida's house, and from there they went to Jawra to appellant's maternal grand mother's house where he again committed rape on her twice, however, the police came at Jawra and brought her to Manasa.

8] The prosecutrix (PW-1), has remained unshaken on her story in her cross examination, except her age regarding which she has stated, that it must have been mentioned by her parents by guesstimate. Although she has stated that she did not inform anyone that she has been kidnapped by the appellant, however, a close scrutiny of her deposition it is found that although she has been suggested that she had gone with the appellant on her own volition, however, there is no suggestion that she was having an affair with



the appellant, in such circumstances, this Court is of the considered opinion that there was no reason for the prosecutrix to elope with the appellant only on his asking.

9] Regarding her age, it is found that Hariram (PW-2), who happens to be the uncle of the prosecutrix, has stated her date of birth to be 10.10.1997, and has stated that her age is 16 years only. Heeralal (PW-4) happens to be father of the prosecutrix, has also stated that she was born on 10.10.1997. Prosecution has also examined Om Prakash Sharma (PW-23) teacher at Govt. Utkrushth Vidyalaya Manasa, who has proved scholar register as (Ex-P-20), and has also admitted that along with the scholar register, no birth certificate or *Pratika* of the prosecutrix is available. He has also stated that he had recorded the age on the basis of her old transfer certificate. Whereas Nand Kishore Prajapati (PW-24) was a teacher at Saraswati Sishu Mandir, Madan and has proved birth certificate (certification/*pramnikaran*) Ex-P-21 and (*Panjikaran*/Registration) Ex-P-22. However, he has also admitted that along with the scholar register, the birth certificate of the prosecutrix is not available, and has stated that date of birth is mentioned on the basis of transfer certificate and also that parents usually inform the date of birth of their wards on their guesstimate only. In such circumstances, this Court is of the considered opinion that such documents viz., ExP-20, ExP-21 and EX-P-22 cannot be taken as positive proof of the age of the prosecutrix, whereas regarding rape Dr.Sonali Goyal (PW-25), who has examined the prosecutrix has stated that no specific opinion can be given about rape as there were no internal



or external injury on the person of the prosecutrix. However, from perusal of her statement it appears that prosecutrix was indeed subjected to sexual intercourse. So far as defence of the appellant is concerned in his accused statement under Section 313 of CRPC, he has not taken any specific defence except that he has been falsely implicated in the case.

10] In such facts and circumstances of the case, this Court is of the considered opinion that the learned judge of the trial Court has not committed any error in convicting the appellant for the offense of rape, except that instead of Section 5(L)(6) of POCSO Act, he should have been convicted under Section 376 of IPC, the charge regarding which was also framed against the appellant in the alternative.

11] In view of the same, **the impugned judgment is partly modified, and it is directed that in place of section 5(L)(6) of POCSO Act, the appellant shall be convicted under Section 376(1)(n) of IPC, whereas his sentences shall remain unaltered. Accordingly, the appeal stands dismissed.** Since the appellant is already absconding, let the perpetual warrants be issued against him, and after his arrest he be made to suffer the remaining part of his sentence as awarded.

12] The appeal stands **dismissed.**

(SUBODH ABHYANKAR)
JUDGE

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