

**HIGH COURT OF MADHYA PRADESH: JABALPUR**

**(Division Bench)**

**Criminal Appeal No. 2090 of 1999**

**1. Bhagwan s/o Ballu Nahal**

**2. Devaki Bai w/o Ballu Nahal**

.....Appellants

Versus

**State of Madhya Pradesh**

.....Respondent

**WITH**

**Criminal Appeal No. 1703 of 2001**

**State of Madhya Pradesh**

.....Appellant

Versus

**Bhagwan s/o Ballu Nahal**

.....Respondent

**CORAM:**

**Hon'ble Shri Justice Huluvadi G. Ramesh,**

**Hon'ble Shri Justice Rajendra Kumar Srivastava**

**APPEARANCE:**

Shri Amit Dubey, Advocate for the appellants/accused.

Shri Vaibhav Tiwari, Public Prosecutor for the State.

**Whether Approved for Reporting: Yes**

**Law Laid Down:**

- May be an attempt would have been made as there is presence of semen on the clothes but the question of offence of rape is not proved beyond reasonable doubt because the prosecutrix has admitted that her engagement had taken place earlier with the appellant No.1; there is absence of any injury on the private part of the victim and doctor has been unable to confirm factum of rape; and further due to admission that there has been previous enmity on account of money transaction and her father had forbidden her not to go to house of accused or even talk to him, there is possibility of accused having been falsely implicated.

- Margin of error in age ascertained by Radiological examination is two years on either side. Thus, age determined by ossification test of the prosecutrix can be accepted as above 16 years as on the date of incident for giving consent. Relied - **Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir and others (AIR 1982 SC 1297)**.

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**Significant Paragraphs:** 22 to 35

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## **JUDGMENT (Oral)**

**(05.12.2018)**

**Per: Huluvadi G. Ramesh, J.:**

These two appeals have been filed against the impugned judgment of conviction and order of sentence dated 13.07.1999 passed by the learned Second Additional Sessions Judge, East Nimar, Khandwa in Sessions Trial No.13/1999. Therefore, both the appeals are being taken up for hearing together and decided by this common judgment.

2. Criminal Appeal No.2090/1999 has been filed by the appellants feeling aggrieved by their conviction and sentence whereby the Trial Court has convicted the appellant No.1-Bhagwan for the offence punishable under Section 366 of IPC and sentenced him to suffer RI for three years and fine of Rs.300/-, in default of payment of fine, RI for six months; further convicted him under Section 376 of IPC and sentenced to RI for five years and fine of Rs.500/-, in default of payment of fine, RI for one year; further convicted him under Section 506 Part II of IPC and sentenced him to suffer RI for one year and fine of Rs.200/-, in default of fine RI for further one month. Further convicted appellant No.2 - Devakibai for the offence under Section 363 of IPC and sentenced her to RI for three years and fine of Rs.200/-, in default of payment of fine further RI for six months and further convicted her for the offence punishable under Section 366 of IPC and sentenced her to suffer RI for three years and fine of Rs.300/-, in default of payment of fine, further RI for six months. All sentences to run concurrently.

3. Criminal Appeal No.1703/2001 has been filed by the State under Section 377(i) of Cr.P.C. for enhancement of sentence imposed upon appellant No.1 – Bhagwan.

4. According to the prosecution, on 08.11.1998, at around 7:30 PM, complainant Jangu (PW-3), who is father of the prosecutrix “S”, lodged a report at Police Station Chhaigaonmakhan to the effect that prosecutrix has been lost in their house. The same was recorded at *Rojnamchasanha* No.254 (Ex.P-8). Report is to the effect that they live at Village Karoli and on the date of incident had gone for labour work. His wife had also accompanied him but in the evening she returned back some time earlier than him. When the complainant returned, his wife informed him that the victim is not at home. They searched her here and there but the victim was not found. As such, father of the victim lodged a missing report describing his daughter. Thereafter, the crime was registered at Police Station Chhaigaonmakhan.

5. During the course of investigation, it was found that accused persons had kidnapped the victim from the lawful custody of her parents and appellant No.1 - Bhagwan has committed rape upon her. The victim was medically examined and ossification test was conducted to ascertain her age. The Investigating Agency after investigating the case framed the charges against the appellant No.1 under Sections 363, 366, 376, 506(2) of IPC while appellant No.2 was charged with the offence under Section 363 and 366 of IPC, which the appellants denied and requested for the trial. Apart from the appellants, charge-sheet was also filed against Guddibai and Jashodabai for the offence under Section 363 and 366 of IPC.

6. The prosecution, thereafter, examined its witnesses and also proved certain documents. Learned Trial Court framed following four questions for determination and holding the appellants-accused guilty of the offence, which are:

- (i) Whether on the date of incident all the accused had kidnapped the victim from the lawful custody of her parents without her consent?

- (ii) Whether on the date, time and place of incident, the prosecutrix was kidnapped by the accused persons with a view to forcibly commit illegal intercourse or violate her or was induced to marry without her consent?
- (iii) Whether during the intervening night of 8.11.1998 and 9.11.1998 in the forest of Sahejla accused Bhagwansingh repeatedly violated the prosecutrix without her consent?
- (iv) Whether on 8.11.1998 at about 4 p.m. in village Karoli while kidnapping the prosecutrix accused Bhagwansingh threatened to kill her and criminally intimidated her with a view to create panic?

7. The learned Trial Court did not find the charge under Section 363 and 366 of IPC to be proved against co-accused Guddibai and Jashodabai and eventually acquitted them from the said charges, while, charge under Section 363 of IPC was also not found to be proven against appellant No.1 Bhagwan and he was also acquitted from the said charge. However, the appellant No.1 – Bhagwan and appellant No.2 Devakibai have been convicted to undergo the sentence, which we have mentioned hereinabove.

8. In this manner, Criminal Appeal No.2090/1999 has been filed by the appellants assailing their judgment of conviction and order of sentence while the State has preferred Criminal Appeal No.1703/2001 for enhancement of sentence awarded to the appellant No.1 - Bhagwan.

9. We have heard Shri Amit Dubey, learned counsel for the appellants-accused and Shri Vaibhav Tiwari, learned Public Prosecutor for the State and find that the appeal preferred by the appellants-accused deserves to be allowed and the appeal filed by the State for enhancement of sentence deserves to be dismissed.

10. Dr. (Smt.) Meena Verma has been examined by the prosecution as PW-1. She has medico-legally examined the prosecutrix, who was brought to her by Ashok, Constable No.375 on 10.11.1998 at 6.45 p.m. The report is Ex.P-4. She found that the prosecutrix was fully grown. She had sustained

an abrasion semi-lunar in shape present on Antero-lateral aspect of upper part of left side of neck size 1.5 cm conversely upward two in number and 1 cm apart, above which scab present. On examining the genitals, no injury was seen on the private parts. Old hymen tags were present and no P/V bleeding was seen. In her opinion, injury No.1 was simple in nature and appears to be caused by nail mark. According to her, no definite opinion can be given regarding recent sexual intercourse. The prosecutrix was referred for radiological examination to ascertain her age.

11. The prosecutrix "S" has been examined as PW-2. According to her, she was below 16 years of age at the time of incident. Her parents had gone to the well for labour job. She, her brother and younger sisters were at home. Appellant Bhagwan is her neighbour. Devakibai came to her and told that she should give Rs.1300/- which her father has brought for well and then she would bring goat and give that to her before her father comes back. The prosecutrix gave Rs.1300/- to Devakibai and after two hours, Devakibai, Guddibai and Jasodabai came to her and asked her to accompany them to the jungle for bringing wood. Then, all these three women took her to jungle. Appellant No.1 Bhagwan was already standing there on the culvert. She further states that his mother Devakibai gave her hand in the hand of accused Bhagwan. There was nobody near in the fields. Accused Bhagwan took out a knife and said that if she dares to shout, she will be killed. According to her, accused Bhagwan made her to walk all night and after reaching the jungle of Sahejla, he took her to a field where cotton was lying and there were shrubs of *Mahu* tree. She has further deposed that near the shrubs of *Mahu* the accused Bhagwan violated her three times. In the scuffle between them, she got hurt on her neck by nails. Her statement further reads that thereafter in the morning the accused took her to Sahejla where in the house of Guddi's in-laws they have had their meals and thereafter, they reached Bhakrada at 9 a.m. She has stated that accused took her to her *Mausi* (mother's sister) where her father Jangu and Ramsingh had also reached. Seeing her father and Ramsingh, the accused ran away and thereafter, her father and Ramsingh brought her to Chhaigaon Police Station. She has stated that she informed the incident to Ramsingh and her father before the incident was

disclosed in the police station. In cross-examination, she has admitted that she is not educated and does not know how to sign. She has admitted that before going to police station, her father and Ramsingh had taken her to Khandwa where a report was prepared through an Advocate, which was given to Captain Sahab. Thereafter, they were sent to police station with the said written report. She, however, stated that in the police station the written work was done by questioning. In cross-examination, this witness has admitted that a year before, she, accused and family members of accused had cut Soyabean crop. She does not go to house of Bhagwan as there is previous enmity with them over *Lekhruo* (accounts) and her father had instructed her not to even speak to them. She has stated that accused belongs to same caste but she denied that she wished to marry him. However, she has admitted that earlier she was engaged with accused Bhagwan. She has admitted that while going to the house of Guddibai after the incident, she met one *Bai* (lady) but she did not disclose to her that accused Bhagwan had forcibly brought her. In the house of Guddibai, her mother-in-law and brother-in-law and sister-in-law were also there but she did not disclose the incident to them. She also did not disclose the incident to anybody in the neighbour of Guddibai. She could not explain as to why the fact of accused showing knife and using force was missing from her police statement.

12. Jangu, father of the prosecutrix, has been examined as PW-3. He has deposed that the prosecutrix, aged 14 years at the time of incident, is her elder daughter amongst his five children. He and his wife Sugrabai had gone to a well to do labour job leaving their children at home. After coming from work, he did not find her daughter at home. They did not find her even after making search here and there. A missing report was lodged at Police Station Chhaigaonmakhan. The very next day he along with Ramsingh reached village Bhakrada in search of her daughter where she was found along with accused Bhagwan. Seeing this witness, the accused ran away. According to this witness, the prosecutrix narrated the entire incident to him. He is witness to panchnama Ex.P-5 in respect of recovery of the girl. In cross-examination, he has stated that he had given a plain paper to the police bearing signature of Kotwar with regard to birth of the prosecutrix. He has

stated that the Police had recorded the statement of Lallu Patel, who had informed his nephew Bahadur (not examined) that his daughter and accused Bhagwan were going together. His nephew had told this fact to him and same was informed to the police but he does not know why this fact is missing from the report. He has admitted that he along with prosecutrix initially went to Khandwa and a typed report was submitted to Superintendent of Police and thereafter, they were referred to the Police Station where the case was registered. He denied that there was any previous enmity with accused Bhagwan and that they had ever worked together. He, however, admitted that during the last soyabean crop, accused Bhagwan had worked with him in the field. A contract was taken for Rs. 8-9,000/-, which was shared. A sum of Rs. 500-600/- approx was received. He states that he alone was the contractor. He denied the suggestion that he did not give accused Bhagwan his share of Rs. 500/-. He also denied that he quarrelled with the accused over this issue. Before the incident they were on visiting terms with each other. He denied the suggestion that his daughter wanted to marry accused Bhagwan. He states that it has been one month since his daughter has been married and this was done so due to fear of accused. He has admitted his signature upon Ex. D-2, which is a report made to S.P. He also denied that in Ex. D-2 he had got written that accused Bhagwan violated his daughter six times. He also denied his statement Ex.-D-2 where he has mentioned that he had a talk with Mausi (mother's sister).

13. Dr. B.K. Maheshwari has been examined by the prosecution as PW-4. He was Radiologist posted at District Hospital, Khandwa on 11.11.1998. He conducted ossification test of the prosecutrix to ascertain her age and the report is Ex.-P-6. In cross-examination, he has admitted that in ossification test there is possibility of age varying two years on either side.

14. Babulal Soni (PW-5) was posted as Head Constable at Police Station Chhaigaonmakhan on 08.11.1998. According to him, Jangu (PW-3) had lodged a missing report of her daughter, which is Ex.P-8. He also prepared seizure memo of a sealed packet brought by Constable Ramesh from the hospital on 11.11.1998. He also prepared Ex.P-10 seizure memo of a sealed packet brought by Laxman from the hospital on 16.12.1998.

15. Gulabchand (PW-6) was posted as Head Constable at Police Station Chhaigaonmakhan. He prepared panchnama Ex.P-5 with regard to recovery of the girl. In cross-examination, he has stated that prosecutrix was brought to Police Station by Jangu (PW-3) and Ramsingh s/o Kishan, Panch had also accompanied him.

16. P.L. Raj, Station House Officer (PW-7) has conducted the investigation. He has prepared spot map (Ex.P-12) at the instance of the prosecutrix; seized the broken pieces of bangles through Ex.P-13; arrested accused through Ex.P-1 and P-2; seized the knife produced by accused Bhagwan, the seizure memo is Ex.P-14; arrested accused Bhagwan on 15.12.1998 through memo Ex.P-3; sent accused Bhagwan for his medical examination through memo Ex.P-7. He has also produced birth certificate of the prosecutrix on the basis of birth register of P.S. Chhaigaonmakhan, which is based on record of Chhaigaonmakhan, mentioning the date of birth of the prosecutrix as 19.5.1984. Such certificate is Ex.P-15. In cross-examination by the defence, he has stated that report (Ex.D-2) was a typed report. He did not think appropriate to seize the said document.

17. On behalf of the defence, Ramsingh has been examined as DW-1. He has stated that he had accompanied Jangu (PW-3) to search her daughter but he did not have any talk with the girl. He had not gone to Superintendent of Police before reaching the police station. He denied portion A to A in Ex.D-2 wherein he stated that "*prosecutrix had told ..... statement of threat was not given*" and portion B to B wherein it was stated that "*allurement of marriage was given .....she was taken there.*" In cross-examination by the prosecution he stated that his statement given to police was only in respect of fetching of girl.

18. Lallu has been examined by the defence as DW-2. He denied his statement Ex.D-3 that he saw accused Bhagwan taking the daughter of Jangu (PW-3) about 20-25 years ago. He was cross-examined by the prosecution. He has stated that he had come to know from the villagers that accused Bhagwan had abducted the daughter of Jangu (PW-3).



19. Learned counsel for the appellants submitted that there is no cogent evidence on record to hold the appellants guilty of the offence and hence, their conviction under Section 363, 366 and 376 of IPC is not sustainable in law. He contended that it is a clear case of false implication as Jangu (PW-3), father of the prosecutrix, has admitted in cross-examination that accused Bhagwan had cultivated Soyabean crop with him and out of that contract they had received Rs.8-9,000/- and Rs.500-600/- each was shared by the workers. Thus, there had been a dispute between father of the prosecutrix and the appellant with regard to payment of Rs.500/- to be made to appellant Bhagwan for the work executed by him. Therefore, he falsely implicated the accused in the case. He further contended that the statements of prosecutrix (PW-2) and Jangu (PW-3) are contradictory to each other and hence, the evidence is not plausible. Further, their evidence is contradictory with the evidence of Dr. Meena Verma (PW-1), who medicolegally examined the prosecutrix vide Ex.P-4. She has opined that no definite opinion can be given as to sexual intercourse. Moreover, Radiologist, Dr. B.K. Maheshwari (PW-4) after conducting ossification test found the prosecutrix to be between 14-15 years of age and it may either way be taken two years extra. In this context, learned counsel has placed reliance upon Supreme Court decision rendered in **Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir and others (AIR 1982 SC 1297)**. It is further argued that certificate Ex.P-15 issued by the Investigating Officer regarding the age of the victim without any basis, cannot be relied upon to ascertain her age.

20. On the other hand, the learned Public Prosecutor has supported the impugned judgment with regard to conviction of the appellants. He has contended that the birth certificate Ex.P-15 has been relied upon by the Trial Court. As per that certificate, the age of the victim is 19.5.1984 and date of incident is 8.11.1998 and thus, she was stated to be aged 14½ years on the date of incident. Learned counsel for the State further relied upon a decision of the Supreme Court rendered in **State of U.P. v. Chhoteylal (AIR 2011 SC 697)** to contend that there is no rule muchless absolute one that two years have to be added to age determined by doctor. As such the question of treating the victim to be aged about 16 years does not arise and rightly the

conviction has been rendered. It is argued that as per FSL report semen stains were found on the underwear, pubic hair and vaginal smear slide of the victim and semen slide, pubic hair and underwear of the accused. The ground raised by the Public Prosecutor for the State in appeal filed for enhancement of sentence is that the Trial Court has erred in awarding the sentence of five years under Section 376 of IPC though as per the evidence on record, minimum seven years' sentence should have been awarded and it may also extend upto 10 years and that without assigning any reason the sentence has been reduced.

21. On the basis of the aforesaid, the following questions arise for consideration:

- (i) Whether there is cogent evidence on record to hold the accused-appellants guilty of the offence for which they have convicted?
- (ii) Whether in the facts and circumstances of the case, the evidence of the prosecution is plausible and prosecution is able to prove the case beyond reasonable doubt against the appellants?
- (iii) Whether the learned Trial Court is justified in convicting and sentencing the accused and what offence, if any, the accused have committed?

22. As per the evidence of Dr. Meena Verma (PW-1), who medicolegally examined the prosecutrix, there are no signs of rape on the prosecutrix and there is also an attempt on her part that the injury found on the neck of the prosecutrix could be a self-inflicted injury.

23. As per the report Ex.P-6 of the Radiologist, Dr. B.K. Maheshwari (PW-4), the age of the prosecutrix would be around 14-15 years and he has further stated that there is possibility that either way two years may be taken for consideration for the purposes of assessing the age of the prosecutrix. If such a benefit of doubt is extended to the advantage of the accused in determining the age of the prosecutrix by adding two years, necessarily the prosecutrix would be around 16-17 years of age and if consent was given for

sexual intercourse on the date of incident, it does not amount to an offence under Section 376 of IPC. In **Jaya Mala (supra)**, the Supreme Court has held that a judicial notice can be taken that the margin of error in age ascertained by Radiological examination is two years on either side. Thus, in the present case, the age determined by ossification test of the prosecutrix can be accepted as above 16 years as on the date of incident for giving consent.

24. In the facts and circumstances of the case, on the date of incident, as per Section 375 of IPC, the sixth description to the offence provides that a man is said to commit “rape” with or without her consent when she is below sixteen years of age. In the present case, since the prosecutrix is found to be around 16-17 years of age on the date of incident, therefore, the aforesaid description is not applicable.

25. As regards, the veracity of birth certificate, Ex.P-15 is concerned, the Investigating Officer, P.L. Raj (PW-7) has admitted that in Ex.P-15 there is no mention that Station House Officer is entitled to give such birth certificate. He could not explain the reason why he did not bring the birth register as it was available in Police Station. Thus, we find force in the submission of the learned counsel for the appellant that such certificate cannot be relied upon to hold that prosecutrix was below 16 years of age on the date of incident. Thus, the age of the prosecutrix determined by the ossification test (Ex.P-6) is more probable and reasonable. The medical evidence indicates that there is no injury on the person of the prosecutrix including her private part and it clearly shows that she was a consenting party to the sexual intercourse. Thus, we are inclined to hold that the prosecutrix was above 16 years of age on the date of incident and looking to the medical evidence on record, since she was a consenting party, it cannot be said that appellant No.1 has committed the offence under Section 376 of IPC.

26. Gulabchand (PW-6), Head Constable, has admitted that the prosecutrix was produced by her father Jangu (PW-3), who was accompanied with Ramsingh. Although Ramsingh was shown to be witness

of the prosecution but he has been examined as defence witness as DW-1. His version before the Court is that did not accompany Jangu (PW-3) and the prosecutrix to Superintendent of Police. His version is that he never gave statement to the police as per Ex.D-2. He says that nothing has been told by the prosecutrix. In the cross-examination by the prosecution, nothing has been elicited. In the context to say that as per the prosecution version, this witness had given statement to the police that he had gone along with the prosecutrix and PW-3 Jangu to make report to Superintendent of Police but no such complaint is said to have been given before the police to support the version of the prosecution. The defence version is also to the effect that no such incident has taken place and Lallu (DW-2) has not given any statement to the police as per Ex.D-3 recorded under Section 161 Cr.P.C. As per the statement, he has last seen the accused with the victim but that statement has been denied by him. However, he stated that once the police had enquired from him but nothing has been elicited by the prosecution in this regard. He has further admitted that he had come to know from the villagers that accused had abducted the prosecutrix.

27. In **Radhu v. State of M.P. [(2007) 12 SC 57]** the Supreme Court held that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradictions and absence of injuries on the private parts of the victim will not by itself falsify the case of rape nor can be construed as evidence of consent. The Court further held that at the same time, the Courts should bear in mind that false charges of rape are not uncommon and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability and thus, whether there was rape or not would depend ultimately on the facts and circumstances of each case.

28. In the case in hand, although PW-3 Jangu has denied any animosity with the accused-appellants but the fact remains that he has admitted that one year prior to the incident, accused-Bhagwan had worked with him where he was contractor and each of the worker was disbursed his share of wages

and Rs.500/- had also fallen in the share of accused-Bhagwan. He also admitted that he married his daughter under apprehension of the accused. Thus, even looking to his statement, it is quite possible that he was on inimical terms with the accused and false implication of the accused persons is probable. To fortify the said inference it is seen that the prosecutrix (PW-2) has admitted that there is animosity with the appellant over *Lekhruo* (accounts) and that her father had told her not to go to the house of the accused or even talk to him. She also admitted that she was earlier engaged with Bhagwan. Thus, there appears to be some animosity between the family of the accused persons and the complainant and therefore, their false implication on that ground by exaggerating the version cannot be ruled out.

29. Apart from the above, it is interesting to note that according to the prosecutrix (PW-2), appellant No.2 – Devakibai had brought the prosecutrix to her son appellant No.1 and thereafter, appellant No.1 committed rape upon her. However, in cross-examination it is clear that the prosecutrix does not know how to read and write and thus, what was being written in the police complaint she would not know. She also admitted that before lodging the report they had gone to Khandwa where report (Ex.D-2) was prepared through an Advocate. It is interesting to note that from her cross-examination it is elicited that engagement ceremony had taken place between accused and the prosecutrix and it is quite possible that she would be a consenting party for sexual intercourse and as such the presence of semen on the undergarments cannot be ruled out.

30. As far as abrasion on the neck of the prosecutrix is concerned, Dr. Meena Verma (PW-1) has admitted that such injury could be caused by self-infliction. It is also seen that appellant No.1 had worked with Jangu (PW-3), father of the victim under his contractorship and there was some animosity or misunderstanding over payment of Rs.500/-. It is quite probable in the village atmosphere for such petty things such complaints are lodged. Thus, under the circumstances, as per the own version of the prosecutrix that she does not know how to read and write, the possibility of false implication cannot be ruled out.

31. If ever such offence was committed, the prosecutrix had the occasion first to disclose the incident to Guddibai, her mother-in-law, and brother-in-law and sister-in-law of Guddibai when accused took her to their house but in her cross-examination she has admitted that she did not disclose the incident to them and that she was forcibly brought by the accused. She remained in the company of the accused-appellant No.1 and had her meals in the house of Guddibai. Thus, it is clear case of consent.

32. It is also pertinent to note that the very fact of vital admissions on the part of the prosecutrix shows the fact that she is the consenting party for the commission of sexual intercourse but no evidence is available on record to show that sexual intercourse has taken place with the accused. In this context, reliance can be had to the decision of the Supreme Court rendered in **Dinesh Jaiswal v. State of M.P. [(2010) 3 SCC 232]** wherein the doctor who conducted the medical examination was unable to confirm factum of rape. The Court held that though evidence of prosecutrix is liable to be believed save in exceptional circumstances but to hold that a prosecutrix must be believed irrespective of improbabilities in her story, is unacceptable. The test always is as to whether the given story prima facie inspires confidence.

33. In view of the said decision, may be in the present case, an attempt would have been made as there is presence of semen on the clothes but the question of offence of rape is not proved beyond reasonable doubt because the prosecutrix has admitted that their engagement had taken place earlier with the appellant No.1. The prosecution is unable to establish case of rape and also there is absence of any injury on the private part of the victim. This fact would also probabalise the case of the defence that the appellant No.1 has been falsely implicated in the case and there is no cogent evidence on record to hold the accused-appellant No.1 guilty of commission of rape and also abduction by appellant No.2.

34. Even if the prosecutrix has stated that rape was committed by the appellant No.1 upon her but there is no cogent evidence of involvement of appellant No.2 to allure, procure and send the prosecutrix to appellant No.1.

The victim has been found to be in the custody of her father Jangu (PW-3). The admission of the prosecutrix (PW-2) is that she does not know reading and writing and what has been written in the complaint also she does not know. It falsifies the fact of giving of report as per the statement made to the police.

35. In view of the aforesaid discussion, the prosecution has failed to prove the offence against the appellants-accused beyond reasonable doubt and it can be inferred that the prosecutrix was aged more than 16 years on the date of incident and was a consenting party and on appreciation of evidence it can be further inferred that no forcible offence of rape was committed by the appellant No.1 and also there is no cogent evidence on record to show that appellant No.2 had kidnapped the prosecutrix. The conclusions drawn by the Trial Court are wholly perverse and illegal.

36. Resultantly, **Criminal Appeal No.2090/1999** filed by the appellants/accused is **allowed**. The impugned judgment passed by the learned Trial Court is set aside and the appellants are acquitted of the offence with which they were charged and convicted. They are on bail, their bail bonds are discharged. As a natural corollary, **Criminal Appeal No.1703/2001** filed by the State for enhancement of sentence awarded to appellant No.1 Bhagwan is **dismissed**.

(HULUVADI G. RAMESH)  
Judge

(RAJENDRA KUMAR SRIVASTAVA)  
Judge

S/