IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

SHRI JUSTICE SUJOY PAUL

&

SHRI JUSTICE PRAKASH CHANDRA GUPTA

CRIMINAL APPEAL No.349 OF 2013

Between :-

BABU @ RAHUL JAGTAP S/O LATE SHRI DILIP JAGTAP, AGED ABOUT 22 YEARS, R/O PATAUWAPURA SHAHPUR P.S. SHAHPUR, DISTRICT BETUL (MP)

….APPELLANT

(*BY SHRI ARVIND CHOUHAN - ADVOCATE*)

AND

STATE OF MADHYA PRADESH, THROUGH H.S.O. POLICE STATION SHAHPUR, DISTRICT BETUL (MP)

….RESPONDENT

(*BY SHRI PRAMOD THAKRE - GOVERNMENT ADVOCATE*)

CRIMINAL APPEAL No.357 OF 2013

Between :-

GIRISH DHANANI S/O SHRI MURLIDHAR DHANANI, AGED ABOUT 21 YEARS, R/O RAILWAY STATION ROAD, SHAHPUR P.S. SHAHPUR, DISTRICT BETUL (MP)

….APPELLANT

(*BY SHRI N.S. RUPRAH, ADVOCATE*)

AND

STATE OF MADHYA PRADESH, THROUGH THE STATION HOUSE

**OFFICER, POLICE STATION SHAHPUR,
DISTRICT BETUL (MP)**

….RESPONDENT

(*BY SHRI PRAMOD THAKRE - GOVERNMENT ADVOCATE*)

Reserved on : 05/7/2022

Delivered on : 09/7/2022

This criminal appeal coming on for hearing this day, ***Justice Sujoy Paul,*** *passed the following :*

J U D G M E N T

These appeals filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (In short "Cr.P.C) take exception to the common judgment dated 29/01/2013 passed in Sessions Trial No.209/2011 whereby both the appellants have been convicted under Section 376(2)(g) of Indian Penal Code and directed to undergo sentence of life imprisonment with fine of Rs.1000/- and Section 366 of Indian Penal Code and directed to undergo R.I. for 5 years with fine of Rs.1000/-, with default stipulation.

FACTUAL BACKGROUND

2. In short, the story of prosecution is that on 29/03/2011 when prosecutrix was coming back from a coaching class on her bicycle, near Post Office Shahpur, the accused persons namely Hridesh Soni, Babu Jagtap and Girish Dhanani, who were riding a bicycle informed her that they may provide her guess papers of Class-9th. Thereafter, in a TVS motorcycle appellant Babu proceeded further whereas appellant Girish

and accused Hridesh accompanied her in a motorcycle till Devdadeo culvert. The prosecutrix was in her own bicycle. At this place, the prosecutrix's face was tied by them by a piece of cloth and appellant Babu started the motorcycle and prosecutrix was compelled to sit in the middle seat of motorcycle and appellant Girish sat on the last seat. They took motorcycle in a very high speed to a temple near Kotmi. As per the prosecution story, all of them committed rape with her one by one and entire incident was recorded through a video camera. Since prosecutrix was alone in the jungle, nobody helped her despite the fact that she cried and screamed. She was later-on released by said three persons near Devdadeo. At Devdadeo, the entire video recording of incident was shown to her by a video camera by appellants and she was threatened that if she tells about this incident to anybody, the video film will be uploaded to Internet and she and her mother will be killed.

3. On 11/07/2011, when prosecutrix was going to school, all the aforesaid accused persons stopped her and asked her to accompany them, otherwise they will upload the CD of said recording of incident of rape to internet. At this stage, the prosecutrix informed about the incident of rape of 29/03/2011 to her mother Babita Jain, father Sunil Jain and uncle Anil Jain. They lodged a report in Police Station Shahpur which was recorded as Crime No.161/2011 under Sections 363, 366, 376(2)(g) and 506 of the IPC.

4. During the investigation, spot map of place of incident was prepared. Prosecutrix was put to medical test as well as X-ray test. The statements of witnesses were recorded. Photocopy of mark-sheet of prosecutrix was placed in the file.

5. From appellant Girish, a motorcycle and mobile phone were recovered whereas from Babu Jagtap @ Rahul, a CD and motorcycle were recovered. They were also subjected to medical test. During investigation, offences under Section 293 of IPC and Section 67 of Information Technology Act, 2000, were added. Thereafter, challan was filed before the Judicial Magistrate, Betul and Case No. 1831/2011 was registered against the appellants. When matter was sent to the trial Court, the appellants abjured the guilt and prayed for conducting the full fledged trial.

6. The trial Court framed four questions for determination.

7. The prosecution alleged that date of birth of prosecutrix is 11.02.1997. Thus, on the date of incident, she was aged about 14 years. The appellants committed gang rape with a minor aged about 14 years.

8. The prosecutrix (PW-3) entered witness box and produced a photocopy of the marksheet of Class 9th which contains the date of birth as 11.02.1997. The Court below considered her statement and came to hold that she was 14 years of age on the date of incident. Although court below considered the statement of Dr. O.P. Yadav (PW-9) based on x-ray report in which he stated that prosecutrix must be aged about 16 years but there is a margin of 2 years for the purpose of determination of age.

9. The prosecutrix in her court statement deposed that she was subjected to rape one by one by all the accused persons. On the basis of her statement, the court below opined that the prosecution could establish its case beyond reasonable doubt.

10. Shri N.S. Ruprah, learned counsel for the appellant- Girish Dhanani and Shri Arvind Chouhan, learned counsel for the appellant-

Babu contended that the story of prosecution is like house of cards. The incident of gang rape is allegedly taken place on 29.03.2011 but complaint was preferred for the first time after about 3½ months on 11.07.2011. No explanation of delay is given by the prosecution. Criticizing the finding of court below regarding age determination of prosecutrix, Shri N.S. Ruprah, learned counsel for the appellant has taken pains to contend that finding is erroneous and runs contrary to the settled legal position. He urged that the age was erroneously determined on oral statement of prosecutrix. The photocopy of Class-9th mark-sheet had no evidentiary value. The court below has erred in basing its finding on photocopy of a document. In fact, Class-9th's Mark-sheet does not contain the date of birth, submits Shri Ruprah.

11. The statement of Dr. Megha Verma (P.W.11) is referred to contend that the medical evidence do not support the prosecution story. The conviction of appellants based on ocular evidence alone is not safe at all.

12. The statement of mother of prosecutrix (P.W.4) is relied upon to show that the mother was aged about 45 years when she deposed her statement in the Court. As per her cross examination, it is clear that prosecutrix would be aged about 18 years. Prosecutrix in her examination-in-chief stated that all the accused persons were unknown to her. It is difficult to fathom as per Shri Ruprah as to how a young girl will accompany three unknown persons in order to get 'guess papers'. It is argued that guess papers are in circulation for board examination and not for class 9th examination.

13. Furthermore, the prosecution story was that entire incident of rape was videographed by the accused persons. However, no camera, film etc.

could be recovered and proved. For this reason, appellants were acquitted for allegedly committing offence under Section 293 IPC and Section 67 of Information Technology Act, 2000.

14. The next limb of argument of Shri Ruprah is that the prosecutrix was not aware about the names of accused persons. Her examination-in-chief, if examined with cross examination will show that she made contradictory statements regarding identity and names of accused persons. No test identification parade (TIP) was conducted. No FSL report supports the case of prosecution. Since the incident of March 2011 was reported in July 2011, the medical test naturally could not support the prosecution story.

15. The prosecutrix, as per prosecution story was taken from a particular place forcibly on a motor cycle by the appellants. No spot map of the place from where she was forcibly taken was prepared. In absence thereof, the story of prosecution is unbelievable.

16. The prosecutrix in her deposition stated that she was studying with the students of class X and XII. In this backdrop, it was unbelievable that she was studying in a coaching with class X and XII students whereas admittedly she was a student of class IX.

17. It is common ground that prosecutrix must be a consenting party in view of her statement in the court. In Para-20 of her deposition, she stated that her hands, legs and mouth were not tied and despite that she did not shout for any help. The incident had taken place near a Shankarji temple and a busy road in the broad day light. Thus, it is difficult to accept that such an incident of gang rape which allegedly continued for more than an hour had actually taken place.

18. Lastly, Shri Ruprah submits that alongwith I.A. No.3633/22 the relevant documents were filed to show that appellant Girish remained in custody for more than twelve years. His conduct in the jail was good, which is clear from a certificate issued by the jail authorities. As per Section 376(g) (unamended), the minimum sentence is ten years. Considering the subsequent good conduct of the appellants, in alternatively, the sentence may be reduced. The reliance is placed on **(2019) 18 SCC 77 (Thongam Tarun Singh Vs. State of Manipur)**. It is urged by both the learned counsel for the appellants that the prosecution could not establish its case as per legal parameters and, therefore, both of them deserve to be acquitted.

19. *Per contra*, Shri Pramod Thakre, learned Government Advocate for respondent-State urged that the victim's statement recorded by the Court shows that she was carrying original mark-sheet of class 9th. This Court can take judicial notice of the said mark-sheet which contains the date of birth of the prosecutrix as 11.2.1997. She was therefore a minor girl of fourteen years on the date of incident.

20. The prosecutrix was threatened by the accused persons after the gang rape that if she narrates about the incident to anyone, the videography of the incident of rape would be made viral. In addition, she and her mother will be murdered. Because of this threat, she did not narrate the incident to anyone for four months. Thus, the delay was properly explained and is not fatal to the story of prosecution.

21. The prosecutrix had seen the accused persons on two occasions, firstly, on the date she was subjected to gang rape by them and secondly, on the date they had threatened her that if she does not accompany them,

her video will be made viral. Thus, she had sufficient time to remember and recognize them.

22. Learned counsel for the parties confined their arguments to the extent indicated above.

23. We have heard learned counsel for the parties at length and perused the record.

24. The Court below determined the age of the prosecutrix as 14 years on the basis of her deposition which was supported by a photocopy of mark-sheet of Class-IX which was pregnant with a date of birth i.e. 11.2.1997. No doubt, the deposition of prosecutrix (PW-3) suggests that she was carrying the original mark-sheet with her. The Court below made no effort to compare the photocopy with the original mark-sheet. Section 63 of the Indian Evidence Act reads as under:-

> **63. Secondary Evidence :-** Secondary evidence means and includes-
> (1) certified copies given under the provisions hereinafter contained;
> (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
> (3) copies made from or compared with the original;
> (4) counterparts of documents as against the parties who did not execute them;
> (5) oral accounts of the contents of a document given by some person who has himself seen it.
>
> (**Emphasis Supplied**)

25. Twin conditions are required to be fulfilled for applying Section 63(2) *viz.* (i) The copies are made from the original by mechanical process. (ii) Copies are compared with *original copies*.

26. In the instant case, the photocopy of mark-sheet which was produced as secondary evidence is made from original is not shown by producing any material. This Court in **Gwalior Development Authority vs. Dushyant Sharma 2013 (3) MPLJ 172** opined that Section 63 and 65 of the Evidence Act are to be read conjointly and if one fulfills the test of secondary evidence, the document can be treated as secondary evidence. As noticed above, the necessary test to bring the documentary evidence within the ambit of secondary evidence was not satisfied by the prosecution. Original school record was not requisitioned. The original record did not come from the proper custody as per requirement of Section 35 of the Evidence Act. The Court below erroneously held that the photocopy of the mark-sheet can be treated as secondary evidence without comparing it with original. A conjoint reading of Section 57 & 78 of Evidence Act does not permit us to take judicial notice of a document (original mark-sheet) which was not marked as exhibit.

27. Since the finding of Court below about the date of birth of prosecutrix is based on a photocopy, the said finding deserves to be jettisoned by this Court. Resultantly, we are constrained to hold that the finding of Court below regarding date of birth of prosecutrix based on photocopy, cannot be accepted. Thus, prosecution could not establish that prosecutrix was minor at the time of alleged incident.

28. The medical opinion of Dr. O.P. Yadav (PW-9) that ossification test shows that she was about 16 years old and there was a possibility of an error of about two years. The Court below has not given any weightage to this finding based on ossification test. The mother of the prosecutrix Smt. Babita Jain (PW-4) could not produce any birth certificate. In **Sunil vs. State of Haryana (2010) 1 SCC 742** it was held that the conviction of

accused cannot be based on an approximate date which is not supported by any record.

29. As noticed above, the incident of gang-rape had allegedly taken place on 29.3.2011 and FIR was lodged on 11.7.2011 i.e. after a delay of 3½ months. No plausible explanation was given by the prosecution for this inordinate delay. As per the statement of prosecutrix, she was subjected to gang-rape by three persons for about 1 hour. She further deposed that because of the said incident, she suffered huge pain and bleeding which continued for 8-10 days. If a young girl of 14 years, as per the story was suffering like that for a considerable long time of 8-10 days, it is difficult to accept that her family members and mother would not notice the same. Thus, in our considered view, no plausible/justifiable explanation of delay in lodging the F.I.R. came forward from the side of the prosecution. The medical evidence did not support the prosecution story.

30. We are not oblivious of the legal position that in cases of sexual assault, delay in lodging the report cannot be measured by taking a stopwatch in hand. In **(2009) 1 SCC 420 (State of H.P. Vs. Prem Singh),** the Apex Court made it clear that the case of sexual assault cannot be equated with the case involving other offences for the purpose of delay in lodging the FIR. There are several factors which weigh in the mind of the prosecutrix and her family members before lodging a complaint. The Apex Court opined that if explanation of delay is properly given, the courts must consider and understand the state of mind of prosecutrix and her family members and shall not brush aside the explanation lightly. There is no difficulty in applying the said principle provided explanation given for delay inspires confidence. In the instant

case, the FIR was lodged after three and a half months from the incident. The singular reason for delay is the fear about the threat of accused persons that they will make the recorded video viral on the internet. At the cost of repetition, the prosecution miserably failed to establish that any videography of the incident had taken place. Resultantly, the appellants were acquitted from allegations under Section 292 of IPC and relevant provision of Information Technology Act. In this backdrop, the Apex Court in **2008 (12) Scale 107 Vijayan Vs. State of Kerala** observed that,-

> "The present case wholly depends upon the testimony of the prosecutrix. The incident in the present case took place seven months prior to the date of lodging the complaint as a realisation dawned upon her that she has been subjected to rape by the appellant/accused. No complaint or grievance was made either to the police or to the parents prior thereto. The explanation for delay in lodging the FIR is that the appellant-accused promised her to marry therefore the FIR was not filed. In cases, where sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the proseuctrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR, it will be very hazardous to convict on such sole oral testimony.
>
> (**Emphasis supplied**)

31. The Delhi High Court in **Ramesh Thakur Vs. State, 2013 SCC Online Del 2161** considered the said case in a matter where delay was

explained by contending that there was a fear in the mind of prosecutrix that video CD of the incident will the circulated. The existence of video CD could not be established. The Delhi High Court therefore held thus-

> "Nonetheless, if no cognizance was taken in respect of the other alleged offences committed on 09/10.10.2006, which related to the alleged CD, <u>despite no CD being ever recovered/produced and the only hollow explanation for delay of eight months in filing the complaint was that she did not report the matter under the fear of CD.</u>"
>
> **(Emphasis supplied)**

32. In the light of aforesaid, delay in lodging complaint in the peculiar facts and circumstances of this case is fatal in our view and creates serious doubt on the story of prosecution.

33. Apart from this, indisputably, no material whatsoever regarding offence allegedly committed under Section 293 of the I.P.C. and Section 67 of the Information Technology Act could be produced and therefore, the appellants were acquitted from the charges relating to the said offences. Thus, neither medical evidence nor any videography could support the prosecution story. The only evidence is the statement of prosecutrix. Her statement, as seen above, does not inspire confidence. The age narrated by her at the time of incident could not be proved as per legal parameters. There is a delay of 3½ months in lodging the FIR. Her cross-examination shows that she accompanied three unknown persons, who promised her to provide her guess paper. She did not shout during the entire incident. She did not narrate about the incident to her mother for a considerable long time.

34. As per allegations, the prosecutrix was forcibly taken in a motorcycle from a busy place. She did not raise any voice when she was forcibly taken. Thus, in our judgment, it will not be safe to uphold the conviction solely on the basis of ocular evidence led by the prosecution.

35. In other words, the prosecution could not establish its case beyond reasonable doubt. The Court below in para-23 of the judgment recorded that the possibility of videography of incident of rape cannot be ruled out and there was a possibility that the said video recording would have been destroyed by the appellants. Merely, because video recording is not received, the case of prosecution will not fail. This finding of Court below is based on surmises and conjectures. In absence of any iota of evidence about availability of any such videography, this finding cannot sustain judicial scrutiny.

36. In view of foregoing analysis, it is clear that the prosecution could not establish its case beyond reasonable doubt. The appellants remained in custody for more than a decade. The Court below has erroneously held that the appellants were guilty, whereas in our opinion, they are entitled to get the benefit of doubt. Resultantly, we deem it proper to acquit them by giving them the benefit of doubt.

37. Resultantly, the judgment passed in Session Trial No.209/2011 dated 29.1.2013 is set-aside. These criminal appeals deserve to be and are hereby **allowed**.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

Ahd/Bks/Manju/
Akm/PK