

**aHIGH COURT OF MADHYA PRADESH:**  
**MAIN SEAT AT JABALPUR**

1	Case number	M.Cr.C. NO.7959/2017
2	Parties Name	Rabiya Bano Vs. Rashid Khan & Anr.
3	Date of Judgment	31/08/17
4	Bench Constituted of	Hon'ble Shri S.K. Seth and Smt. Anjuli Palo, J.J.
5	Judgment delivered by	Hon'ble Smt. Anjuli Palo, J.
6	Whether approved for reporting	Yes
7	Name of the counsel for parties	Shri Sanjay Patel, counsel for the petitioner. Shri Akshay Namdeo, Government Advocate for the respondent No.2/State.
8	Law laid down	The appellate court may only interfere in an appeal against the acquittal where there are substantial and compelling reasons to do so.
9	Significant paragraph numbers	21 & 22

**(S.K. SETH)**  
**JUDGE**

**(SMT. ANJULI PALO)**  
**JUDGE**

**HIGH COURT OF MADHYA PRADESH AT JABALPUR****M.Cr.C No. 7959/2017****Rabiya Bano**

Vs.

**Rashid Khan & Anr.****Present : Hon'ble Shri Justice S.K.Seth, Judge**  
**Hon'ble Smt. Justice Anjuli Palo, Judge**

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Shri Sanjay Patel, counsel for the petitioner.  
None for the respondent No.1.

Shri Akshay Namdeo, Government Advocate for the  
respondent No.2/State.

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**Whether approved for reporting (Yes)**

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**Law laid down :-**

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**Significant Paragraphs :-**

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**ORDER**  
**(31/08/2017)****Per : Smt. Anjuli Palo :-**

1. This application under Section 378 (3) of Code of Criminal Procedure has been filed by the prosecutrix for leave to appeal being aggrieved by the judgment dated 10.4.2017 passed by the 7<sup>th</sup> Additional Sessions Judge, Bhopal in Sessions Trial No.196/15, whereby the learned trial Court has acquitted the respondent No.1 for the offences punishable under Sections 363, 366, 376 (2) (I) of IPC and Section 3/4 Protection of Children from Sexual Offences Act, 2012.

2. As per the prosecution case, the prosecutrix who was aged about 15 years was residing with her parents. On 11.2.2015 at about 10.00 pm when the prosecutrix was in front of her home, the accused came there and closed her mouth and took her to the roof of her house and committed rape with her. On 16.2.2015 when her father returned back to home from Bombay, the prosecutrix narrated the incident to her parents. Thereafter she lodged the FIR at the police station, Shyamla Hills against the respondent No.1. An offence under Sections 363, 366, 376 (2) (I) of IPC and Section 3/4 Protection of Children from Sexual Offences Act, 2012 has been registered against him. After completing the investigation, the police filed a charge sheet before the concerned magistrate and the same was committed to the trial Court.

3. The learned trial Court framed the charges against the respondent No.1 under Section 363, 366, 376 (2) (I) of IPC in alternate under Section 3/4 Protection of Children from Sexual Offences Act, 2012. The respondent No.1 abjured his guilt and stated that he was falsely implicated by the complainant family to create pressure on him to marry with the prosecutrix. In this regard defence witnesses also produced by the respondent No.1. Further the respondent No.1 also took plea of alibi.

4. After appreciation of evidence on record, the learned trial Court found that the prosecution has failed to establish that the prosecutrix was minor at the time of incident and the respondent No.1 committed rape on her. It was also found that the prosecutrix was 26 years of age and her conduct was unnatural. The incident was narrated by her to the parents after 5 days of the incident. The FIR was delayed, therefore, the respondent No.1 has been acquitted from the offences punishable under Sections 363, 366, 376 (2) (I) of IPC in alternate

under Section 3/4 Protection of Children from Sexual Offences Act, 2012.

5. The prosecutrix has submitted that the findings of the learned trial Court are illegal and contrary to law. The learned trial Court committed error in holding that the prosecution failed to prove the allegation without proper appreciation of the medical material available on record.

6. Heard and perused the record.

7. Learned GA has opposed the above grounds and submitted that the findings of the trial Court is based on the evidence on record, hence, no interference is called for in the findings of the learned trial Court.

8. Two questions arise for our consideration :-

(1) Whether the trial Court was correct in concluding that it cannot be assumed that the age of the prosecutrix was less than 18 years on the date of incident ?

(2) Whether the trial Court erred in discarding the testimony of the prosecutrix which could be made sole basis for convicting the accused ?

9. With regard to the age of the prosecutrix at the time of offence, the prosecutrix (PW1) herself has not stated about her date of birth. At the time of incident she was student of 7<sup>th</sup> Class. Her father Abdul Mazid (PW2) and her mother Rajio Bano (PW3) both of them have also not deposed the date of birth of the prosecutrix. Abdul Mazid (PW2) has explained that the prosecutrix is her elder daughter. In paragraph 10 he explained that he had not gone to the School for admission of the prosecutrix. The prosecutrix was admitted in school by her mother. In paragraph 8 Rajio Bano (PW3) her mother explained the date of birth was recorded by her on the basis of mark

sheet. In the last part of paragraph 8, she again explained that she has no document with regard to date of birth of her daughter.

10. Prashant (PW6), Principal of Public Higher Secondary School in his cross-examination has admitted that he had no birth certificate or other document with regard to ascertain the exact date of birth of the prosecutrix. From his testimony, it seems that he was not able to say that the date of birth registered in the school record is right or wrong. The aforesaid evidence is not the conclusive evidence to prove the date of birth of the prosecutrix as 10.6.2000. No ossification test was conducted by the doctor which would establish the characteristic, fusion of bones, proof of date of birth, etc. to determine the age of the prosecutrix. Hence we find that the date of birth of the prosecutrix was recorded by her mother in school record is based only on presumption, hence it is not found reliable.

11. The Apex Court in the case of **Jarnail Singh Vs. State of Hariyana [ 2013 (7) SCC 263]** has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 though strictly applicable to a child in conflict with law, would also be applicable to determine the age of a child who is a victim of a crime. Accordingly, Rule 12(3) is applicable for determining the age of the prosecutrix, which reads as under:

**“12.Procedure to be followed in determination of Age:-**

3. In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the committee by speaking evidence by obtaining:-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted

Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be record a finding in respect of his age and either or the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

12. At the same time, it has also been held in **Birad Mal Singhvi V. Anand Purohit, 1988 Supp. SCC 604** (Paragraph 15) that an entry relating to date of birth made in a school register is not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded [See also **State (Govt. of NCT of Delhi) V. Charan Singh, 2017 SCC OnLine Del 8186 (paragraphs 16-21)**; and **State (GNCT of Delhi) V. Mohd. Irfan, 2017 SCC OnLine Del 9111 (paragraphs 12-15)**].

13. Accordingly, the documents on record could not be relied upon and prove that the age of the prosecutrix was less than 18 years at the time of incident. Thus, the ingredients of Section 361 of IPC are not established by the prosecution.

14. In the case of **State of M.P. Vs. Munna 2016 (1) SCC 696**, the Supreme Court has held as under :-

“The age of the prosecutrix not proved beyond reasonable doubt to be less than 16 years of age at the time of incident, therefore, the High Court was right in holding that the prosecutrix was more than 16 years of age and was competent to give her consent.”

15. The prosecutrix (PW1) has stated that the incident was took place at about 10.00 PM and at that time her mother, brother, real aunty and uncle were present in the home. It cannot be possible for

the respondent No.1, without the consent of prosecutrix, he abducted her and took her on the roof of the house through the stairs. The story told by the prosecutrix that due to fear of the respondent No.1 she could not raise the alarm seems to be unnatural and doubtful because the respondent No.1 was bare handed. After the said incident, the prosecutrix kept mum for about 4-5 days. She could have told the incident to her mother and brothers, who were present in home at that time. She also stated that she is more closure to her mother than her father. Then why she waited up to 4-5 days for her father, not immediately narrated the incident to her mother.

16. Dr. Dipti Pawar (PW8) in the medical examination of prosecutrix found her secondary sex character was well developed and hymen was old and healed. Doctor not found any internal or external injury over the body of the prosecutrix. No definite opinion was given by her about intercourse with the prosecutrix.

17. The medical opinion also indicates that the prosecutrix was found habitual to have intercourse. It seems that due to pressure of her family members, she lodged the report against the respondent No.1. Hence delayed FIR has also great importance, which creates reasonable doubt to the testimony of the prosecutrix, hence the benefit of doubt be given to the respondent No.1. The defence taken by the respondent No.1/accused seems to be reasonable and plausible. Prior to the incident both of them known to each other very well.

18. Samsheer (DW1) deposed that prior to the incident, father of the prosecutrix came to his home with the proposal of marriage for the prosecutrix with the respondent No.1. Mohd Arshad (DW2) deposed that at the time of incident, respondent No.1 was present with him at Lalghati Chouraha up to 12.30 PM. Thereafter the respondent No.1 went to his home. The value of defence witness is equal to the prosecution witnesses, which creates reasonable doubts about the

story of prosecution. Therefore, due to above mentioned weaknesses of testimony of the prosecutrix, the defence evidence cannot be ignored superficially.

19. On the above ground, it could be interfered that the respondent No.1/accused would not have forcibly had sexual intercourse with the prosecutrix (PW1).

20. The circumstances lead us to the conclusion that she freely, voluntarily and consciously consented for having sexual intercourse with the respondent No.1. She did not resist the respondent No.1.

21. In the cases of **Ghurvey Lal Vs. State of U.P. [ AIR 2009 SC (Supp) 1318]** **Madarthi Narayan Vs. State of Kerala [ 2017 Cr.L.J. 732 (SC)]** and **Mahaveer Singh Vs. State MP [ 2017 Cr.L.J. 749 (SC)]**, the Apex Court has held that in appeal against acquittal of two views are possible. View which goes in favour of the acquittal has be adopted.

22. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against the acquittal where there are substantial and compelling reasons to do so, as held in cases of **Sheo Swarup Vs. King Emperor [ AIR 1934 PC 227 (2)]**, **M.G. Agrawal Vs. State of Maharashtra [ AIR 1963 SC 200]** and **State of Rajasthan Vs. Rajaram [ (2003) 8 SCC 180]**.

23. In the above circumstances, we are of the considered opinion that no interference is warranted in the impugned judgment. Hence leave is not granted in favour of the appellant to file appeal against acquittal. Accordingly, the application is dismissed.

24. Let the record be sent back to the trial Court alongwith a copy of this order.

**(S.K.SETH)**  
**JUDGE**

**(SMT. ANJULI PALO)**  
**JUDGE**