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CRA-14475-2023

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE VIVEK AGARWAL

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HON'BLE SHRI JUSTICE AVANINDRA KUMAR SINGH

ON THE 14th OF AUGUST, 2025CRIMINAL APPEAL No. 14475 of 2023*DEUL KHAROLE**Versus**THE STATE OF MADHYA PRADESH AND OTHERS*

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Appearance:

*Shri Chintransh Shrivastava, learned counsel for the appellant.**Shri Nitin Gupta, learned Public Prosecutor for the respondent/State.*
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ORDER

Per. Justice Vivek Agarwal

Learned counsel for the appellant prays for withdrawal of I.A. No.7298/2025, which is first application for suspension of sentence and grant of bail to the appellant.

Accordingly, I.A. No.7298/2025 is dismissed as withdrawn.

With the consent of learned counsel for the parties, the matter is heard finally.

This appeal is filed being aggrieved of the judgment dated 9th October, 2023 passed by learned Special Judge, POCSO Act, Balaghat in Special Case No.25/2021 whereby learned trial Court has convicted and sentenced the appellant in the following terms :



<u>Conviction</u>		<u>Sentence</u>		
<u>Section</u>	<u>Act</u>	<u>Imprisonment</u>	<u>Fine</u>	<u>Imprisonment in lieu of fine</u>
366	I.P.C.	R.I. for 07 years	Rs.5,000/-	R.I for 03 months
3/4	POCSO Act	R.I. for 10 years	Rs.5,000/-	R.I. for 03 months
5(1)/6	POSCO Act	R.I. for 20 years	Rs.5,000/-	R.I. for 03 months

2. It is submitted that present is a case of consent as can be seen from the statement of victim (PW-1). She was adult which is evident from the x-ray report available on record dated 28/06/2021 which prosecution has not deemed proper to exhibit before the trial Court, thus, it appears to be going against the prosecution and reflects towards the intellectual dishonesty of the prosecution in not exhibiting the documents which favour the accused. It is also submitted that even trial Court committed a grave error in overlooking the x-ray in which the Radiologist of District Hospital, Balaghat has mentioned that O.C. of illiac crest has fused. O.C. of lower ends of radius and ulna fused. O.C. of head of radius and O.C. of olecranon proceeds of ulna fused, so her age approximately 17 years.

3. It is further submitted that as per the Textbook of Medical Jurisprudence and Toxicology, 24th Edition 2011 by Lexis Nexis Butterworths Wadhwa, Nagpur by Modi, it is mentioned that in such cases there can be error of upto two years.

4. It is submitted that date of birth of the victim has come on record as



24/12/2004 vide Ex.P/24-C proved by Mamta Sharnagat (PW-9). It is submitted that this age is not correct as is admitted by mother of the victim (PW-2) who deposed that she does not know the date of birth of the victim and also deposed that she along with her husband had gone to the school for admission of the victim, but, they do not know the date of birth whereas father of the victim (PW-3) also deposed that he had neither prepared the birth certificate nor name of the victim was registered in the *Kotwar Panji* of the village and he does not know the date of birth, a sufficient piece of evidence that victim was adult at the time of the incident, therefore, positivity of the DNA as contained in Ex.C/1 is not a sufficient circumstance to uphold the conviction.

5. Shri Nitin Gupta, learned Public Prosecutor, in his turn, opposes the prayer and submits that DNA report is positive. Date of birth register is not disputed, therefore, no indulgence be called for.

6. Having heard learned counsel for the parties and going through the record. Mrs.Mamta Sharnagat (PW-9), Middle School Teacher, Govt. High School, Piparjhari, Distt. Balaghat deposed that victim was not given admission during her tenure. This witness admitted that there is no document available on record to support the date of birth of the victim. This witness also deposed that victim had left school on 01/05/2015 after taking admission on 05/04/2010.

7. Father of the victim (PW-3) deposed that they had not prepared any birth certificate for the victim and they had not obtained any document from the Village Kotwar. This witness admitted that he got the victim



admitted in the school and had not given any document in regard to her date of birth. Mother of the victim (PW-2) also admitted that she cannot state as to on what basis date of birth of the victim was recorded.

8. Victim (PW-1) admitted that appellant is known to her. Appellant is the resident of Village Devgaon where her *Mausi* is residing. In cross-examination, victim deposed that she had gone with two other persons to earn their livelihood at Hyderabad. She was residing with a female companion in one room. Both used to travel together to work as labour. When Police intercepted them at Hyderabad, then this witness herself and two other companions were caught hold off but appellant-Deul Kharole was not present. Victim admitted that she had left her parents' home without informing her parents. This witness admitted that out of fear of her parents, she had taken name of the appellant for the first time.

9. In her statement recorded under Section 164 of Cr.P.C. (Ex.P/3), victim stated that appellant is known to her for last one year. They were talking to each-other on mobile phone. About ten days prior to the incident, she had a talk on mobile phone with appellant-Deul who proposed her for marriage. She gave her acceptance and then appellant-Deul visited her village, then both had travelled on foot to Saletakra and from where they reached Gondidya then they had boarded a train to travel to Hyderabad.

They had stayed at Hyderabad in a room. Appellant-Deul took her to a Durga Temple where they performed marriage and after performance of marriage, Deul had brought her back to the room and established physical relationship.



10. Dr.Geeta Barmate (PW-12), lady doctor, deposed that there were no injury marks on any part of the body including private parts. Hymen was old torn. There was no bleeding, no redness. No definite opinion in regard to violation of privacy can be given. She had advised x-ray examination to determine the age of the victim. UPT test was found to be negative. She had prepared certain slides and sent for FSL examination. She exhibited her MLC report as Ex.P/23.

13. It is surprising to note that despite regular training in the Madhya Pradesh State Judicial Academy, learned trial Courts are consistently failing to perform their duties as a Judge. Though DNA report is exhibited as Ex.C/1 on 06/10/2023 i.e. after closer of the prosecution evidence, but, trial Court did not deem it proper to record supplementary statement of accused under Section 313 of Cr.P.C. and confront him to the circumstances which appeared against him in view of DNA test report despite referring it in its judgment..

14. Another interesting but horrific aspect is that despite there being availability of x-ray report on record as was ordered by Dr. Geeta Barmate (PW-12), that has neither been exhibited nor Court deem it proper to mark it as a Court Exhibit. This report *prima facie* appears to be in favour of the accused inasmuch as the Textbook of Medical Jurisprudence and Toxicology by Modi makes a mention of crest of illium fusion in females is between the age of 17 to 19 years. When this aspect is taken into consideration, then the range of age of the victim will be between 17 to 19 years.

15. In the case of **Alekh Prasad Vs. State**, (1964) 2 Cr.L.J. 102 , it is



held that *if the other evidence of age is wholly unsatisfactory, the ossification test may be accepted as a surer ground for determination of age particularly when the accused gets a benefit of doubt on that basis.* In the case of **Mohd. Said Khan Vs. State of Madhya Pradesh, (1985) 1 Crimes 1 (MP)**, it is held that *an ossification test, though not a sure test, is generally accepted as the best available test for the determination of the age of the human beings.* In the said judgment, it is further held that *however, it is certainly conducive and a slight variation in that opinion is always possible.*

16. In the case of **Dholu S/o Jyutu Govind Vs. State of Madhya Pradesh, (1985 1 Crimes 403 (MP))** and also in the case of **Jayamala Vs. Home Secretary, Government of Jammu Kashmir, AIR 1982 SC 1297**, it is held that *there can be a variation of an year or two on either side in the opinion regarding age based on ossification test.*

17. When this aspect is taken into consideration, then we are constrained to observe that trial Court committed several irregularities. It, firstly, did not take cognizance of ossification test report available on record and, secondly, it did not pose questions under Section 313 of Cr.P.C. to the accused on the basis of the DNA test report (Ex.C/1).

18. In the light of the judgment of Division Bench of this High Court in **Lallusingh S/o Jagdishsingh Samgar Vs. State of M.P., 1996 MPLJ 452**, when a document is available on record, then accused can take advantage of the said document even without proof of the same in his defence. When judgment of Hon'ble Supreme Court in the case of **Jayamala (supra)** is taken into consideration and also in the light of the judgment of Hon'ble Supreme



Court in **Karan alias Fatiya Vs. State of Madhya Pradesh, (2023) SCC Online SC 217**, wherein it has been observed by Full Bench of Hon'ble Supreme Court that *ossification test gives only a broad assessment of the age and not give an exact age* and it also observed that *there is also an element of margin of plus or minus one to two years*, then we are of the opinion that ossification report not giving the range and in view of clear finding of O.C. of illiac crest being fused, benefit can be and should be extended in favour of the accused especially when both the parents of the victim have failed to bring on record any documentary evidence in regard to date of birth of the victim. Therefore, as per the ossification report which was promptly drawn within one month of the incident, since there can be an error of a year or two and when that error is taken into consideration, then victim will be deemed to be an adult, benefit is required to be accrued in favour of the appellant.

Accordingly, when that benefit is extended and statement of the victim recorded under Section 164 of Cr.P.C. are taken into consideration as are contained in Ex.P/3, then impugned judgment of conviction cannot be upheld.

19. Accordingly, this appeal is allowed. The impugned judgment of conviction is hereby set aside. Appellant is acquitted of the charges. Appellant be released immediately, if not required in any other case.

20. Case property be disposed of as per the directions of the learned trial Court.

21. Record of the trial Court be sent back immediately.



(VIVEK AGARWAL)
JUDGE

(AVANINDRA KUMAR SINGH)
JUDGE

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