

# **SUPREME COURT OF INDIA**

State of M.P.

Vs.

Ajab Singh

CrI.A.No.2177 of 2011

(V.Gopala Gowda and A.K. Goel JJ.)

04.09.2014

## **JUDGMENT**

1. This appeal is filed by the State of Madhya Pradesh questioning the correctness of the judgment and order dated 14.07.2009 passed in Criminal Appeal No. 1541 of 1994 in allowing the appeal filed by the accused (Respondent herein) by setting aside the judgment of conviction and sentence of the Respondent Under Section 376 of the Indian Penal Code, hereinafter referred to as 'the Code'. However, the term of custodial sentence imposed for an offence Under Section 366 of the Code has been reduced from five years to three years by the High Court. The brief facts in nutshell are stated hereunder for the purpose of appreciating the rival legal contentions urged on behalf of the parties to find out as to whether this Court is required to interfere with the impugned judgment and order of setting aside the conviction and sentence for the offence Under Section 376 of the Code. The case of the prosecution is that on 03.01.1994, at about 5.30 P.M. when the victim-prosecutrix found that her mother had not returned from the office, the co-accused Badri gave a false promise to marry her and persuaded her to accompany him. She was taken to a garden where Badri has subjected her to sexual intercourse. On way back to home, the Appellant had also joined them in the transit and after a short discussion about the future plan, he and Badri took the prosecutrix in a minibus to railway station. Badri assured the prosecutrix that after making all necessary arrangements for the marriage he would come back to her next morning. The co-accused Badri persuaded the prosecutrix to go with the Respondent. However, he did not fulfill the promise. After obtaining custody of the prosecutrix from Badri, the Respondent first took her to his aunt's house that

was located in Chandbarh and after introducing her as his sister-in-law, stayed there for the night. On the following day, he fraudulently induced the prosecutrix to accompany him from one place to another by misrepresenting her that Badri was expected to arrive there and in the night, she was taken to his house situated in village Hinotia where she was made to stay in the portion occupied by his tenant namely Vijay, husband of Usha (PW-12). During the night hours, the Respondent came to the room where the prosecutrix was sleeping and committed rape on her.

2. A case was registered against Badri and the Respondent for the offences punishable Under Section 366 and 376 read with Section 34 of the Code. The charge-sheet was filed in the case and the case was committed to the Sessions Court, i.e. IV Additional Sessions Judge, Bhopal, Madhya Pradesh and registered as Sessions Trial No. 213 of 1994. The trial was conducted and in all sixteen persons were examined as prosecution witnesses to prove the charges levelled against the accused. The trial court, on appreciation of the evidence on record held that the age of the prosecutrix was under 16 years. In support of the age of the prosecutrix, the prosecution has produced the documentary evidence of school transfer certificate (Exh. P-17) and copy of the same (P17-A) was placed on the record and the entry registered in the scholar register of Shri Ram Krishana School (Exh. P-16), which copy (Exh. P16-A) was on record, wherein the date of birth of prosecutrix has been recorded as 05.09.1982. Therefore, the prosecution asserted that the age of the prosecutrix was only 12 years at the time of committing offence of rape by the accused. In addition to the aforesaid documentary evidence, the prosecution has examined Dr. C.S. Jain (PW-5) to prove the injuries caused in the general organs of the prosecutrix and he has stated that the said injuries have been caused by the sexual intercourse. The trial court, after elaborately referring to the evidence of the prosecution witnesses, has recorded a finding of fact on the charges considering both oral and documentary evidence on record that the age of the prosecutrix is less than 16 years and, therefore, the question of her consent does not arise, as provided in VI Exception to proviso to Section 376. The trial court came to the aforesaid conclusion on facts and evidence on record and recorded the finding of fact on the said aspect of the matter, on the basis of evidence of the prosecutrix and other material evidence on record.

3. It has been argued by the learned Counsel for the Respondent that the evidence of the prosecutrix cannot be accepted as there is material contradiction in her statement.

4. The trial court, on the basis of evidence of one Kamal Singh (PW-3) and Dr. Hemlata Mandloi (PW-6) held that the offence of the accused is proved beyond reasonable doubt. PW-6 in her deposition stated that she has found the hymen of the unmarried prosecutrix cracked after her examination on 11.01.1994 and it was in the state of 5'O clock by the watch. Though she has not given any definite opinion about the rape of prosecutrix, Dr. C.S. Jain (PW-5), who examined the prosecutrix in relation to her age, deposed that the injuries caused in the general organs of the prosecutrix were found in the state of 5'O clock by watch and he has stated that the injuries were caused by the sexual intercourse. The trial court further held that the aforesaid offences are proved against the accused beyond reasonable doubt and it is further proved that in order to commit illegal sexual intercourse, the accused have committed rape with the prosecutrix and have taken her to Chandband and other places and the village Hinoutiya, which amounts to an offence of kidnapping of the prosecutrix.

5. The order of the trial court was challenged by the accused-Respondent before the High Court urging various legal grounds. The High Court has interfered with the judgment of conviction and sentence Under Section 376 and affirmed the conviction Under Section 366. However, it reduced the term of imprisonment from five years to three years. Legality and correctness of the same is challenged before us in this appeal by urging number of grounds by the State Government. The learned Counsel appearing for the State Government prayed for setting aside the impugned judgment and order and for restoration of the judgment and order of conviction and sentence imposed upon the accused by the trial court.

6. Our attention is invited by the learned Counsel appearing for the State Government to the finding of fact recorded by the trial court in its judgment and order, on the basis of the oral and documentary evidence, wherein it has held that the age of the prosecutrix is below 16 years and that is sought to be disbelieved by the High court after adverting to the evidence of Shanti Bai (PW-9), the mother of the prosecutrix and Dinesh Kumar (PW-15), the former Vice-Principal of Shri

Ramkrishna Bal Vihar, a private school. The learned Counsel appearing on behalf of the Appellant-State Government urged that the High Court in the impugned judgment has erroneously held that in the absence of birth certificate or any cogent piece of evidence, the entries of the register of the private school suggesting the date of birth of the prosecutrix on the date of alleged offence was held to be below 12 years, which finding is not acceptable. The said finding of the High Court is not supported with cogent and valid reasons. Further, the High Court had at Para 9 of the impugned judgment has referred to the medical report of the PW-5, who had taken into consideration the findings of anthropological, dental and radiological examinations to hold that the age of prosecutrix is 16-1/2 years. PW-5 further testified that the prosecutrix 's shoulder joints, hip joints and ankle joints were subjected to X-ray examination. Therefore, in his opinion, the same was in conformity with the following passage from Jhala and Raju's Medical Jurisprudence:

"If ossification test is done for a single bone the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion the margin of error may be reduced. Sometimes this margin is reduced to six months on either side."

7. The learned Counsel for the Appellant submitted that the High Court has erroneously placed reliance upon the judgment of this Court rendered in the case of Ram Deo Chauhan v. State of Assam AIR 2001 SC 2231 and recorded a finding that the prosecutrix was not found to be below 16 years of age. Therefore, the High Court was of the view that the conviction for the offence of rape in relation to the accused-Respondent deserves to be interfered with, which deserves to be set aside, according to the learned Counsel, by this Court as the High Court has erroneously set aside the finding of guilt of the accused on the charge of rape of prosecutrix.

8. After careful consideration of the rival submissions and the material on record, we are of the considered opinion that the trial court has rightly disbelieved the evidence sought to be elucidated by the accused in the cross-examination of PW-9 by way of putting suggestion to her that the marriage of the prosecutrix had already taken place. That suggestion was not rightly accepted by the trial court by

referring to the evidence PW-9, who has explained in her cross-examination that the marriage of her daughter, i.e. the prosecutrix, was solemnized on 25.05.1994, after the incident and, thereafter, the trial court has recorded a finding of fact after referring to certain decisions of the Madhya Pradesh High Court and the Punjab and Haryana High Court and held that the prosecutrix 9 was kidnapped by the co-accused Badri with temptation and he committed the offences punishable Under Section 366 and 376 of the Code. Further the finding and reasons arrived at by the High Court on the charges framed against the accused are erroneous for the reason that the order of the trial court was based upon proper appreciation of cogent and legal evidence on record particularly the evidence of school admission register and the evidence of PW-15 to prove the entries of the school admission register regarding the age of the prosecutrix and evidence of PW-9, who has asserted in her deposition that the age of the prosecutrix is 13 years. Therefore, the finding of fact recorded by the trial court with regard to the age of the prosecutrix is based on cogent and valid reasons and the same should not have been disbelieved by the High Court while re-appreciating the medical report (Exh. P-3) and the evidence of PW-5 and placing strong reliance upon the same to reverse the finding of the trial court. Therefore, the High Court has erroneously held that the age of the prosecutrix is 16-1/2 years, which finding of fact is perverse and bad in law. The same is liable to be set aside. In view of the above, the finding recorded by the trial court that the age of the prosecutrix is below 16 years has to be accepted.

9. Significantly, if the age of the prosecutrix is accepted as below 16 years, then the prosecution has discharged its burden with regard to the offence of rape Under Section 376 and the finding recorded on the offence of kidnapping and rape and there is a presumption Under Section 114A of the Evidence Act in favour of the prosecution that the offence is committed by the accused. The accused have not adduced rebuttal evidence in this regard to disprove that the offence of rape is not committed by them.

10. The trial court being a fact finding court had the opportunity to examine the demeanour of the prosecution witnesses and it applied its mind and properly appreciated the evidence on record and recorded the finding of fact on the charges levelled against the accused after accepting the prosecution case, particularly the

evidence of prosecutrix, PW-5, PW-6 and PW-9. The finding on the charge of rape was required to be accepted by the High Court, however, instead of that, it has wrongly reversed the finding, after setting aside the finding of fact recorded by the trial court on erroneous approach by referring to the evidence of medical report (Exh. P-3) and 11 accepting the evidence of PW-5, the evidence which could not have been accepted in view of the cogent oral and documentary evidence by PW-9, PW-15 and PW-16 (Prosecutrix). Furthermore, there is documentary evidence on record i.e. Exh. P-16 and Exh. P-17, that the date of birth of the prosecutrix is below 16 years as on the date of the occurrence. Therefore, the finding recorded at paragraph 8, 9 and 11 of the impugned judgment and order and placing reliance on the judgment of this Court in the case of Ram Deo Chauhan (supra) and the report of PW-5 are inapplicable to the fact situation. Therefore, the said findings are liable to be set aside and are accordingly set aside.

11. In our considered view, the finding of fact recorded by the trial court on the charges levelled against the accused Under Section 366 and 376 of the Code and the sentence imposed by it are required to be accepted. The learned Counsel appearing for the Appellant has rightly placed reliance upon the judgment of this Court in the case of State of H.P. v. Shree Kant Shekari (2004) 8 SCC 153, paragraphs 14 and 15 of which are worthwhile to be extracted and the same are reproduced hereunder:

"14. We shall first deal with the question of age. The radiological test indicated the age of the victim between 15 to 16-1/2 years. The school records were produced to establish that her date of birth was 10.4.1979. The relevant documents are Ex. PW6/A to PW6/C. The High Court was of the view that these documents were not sufficient to establish the age of the victim because there was another document, Ex. PW7/A which according to the High Court did not relate to the victim. Merely because one document which was produced by the prosecution did not, according to the High Court relate to the victim that was not sufficient to ignore the evidentiary value of Ex. PW6/A to Ex. PW6/C. These were records regarding admission of the victim to the school and her period of study. These documents unerringly prove that the date of birth of the victim as per official records was 10.4.1979. Therefore, on the date of occurrence and even when the FIR was

lodged on 20.11.1993 she was about 14 years of age. Therefore, the question of consent was really of no consequence.

15. Even otherwise, the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It was not for the victim to show that there was no consent. Factually also the conclusion is erroneous right from the beginning that is from the stage when the FIR was lodged and in her evidence there was a categorical statement that the rape was forcibly done notwithstanding protest by the victim. The High Court was, therefore, wrong in putting burden on the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent. It is significant to note that during cross examination and the statement recorded Under Section 313 of the Code of Criminal Procedure, 1973 (in short "the Code") plea of consent was not taken or pleaded. In fact in the statement Under Section 313 of the Code the plea was complete denial and false implication."

12. We have, after careful examination of the findings and reasons recorded by the trial court, come to the conclusion that the findings of the appellate court with regard to the age of the prosecutrix that she is more than 16-1/2 years of age and therefore, there was a consensual sex, is bad in law. Thus, the setting aside of the conviction and sentence Under Section 376 by the High Court is perverse in law for the reason that the accused-Respondent has not discharged the presumptive value in favour of the prosecution that he has not committed the offences charged against him.

13. For the aforesaid reasons, we are of the view that the findings and the reasons recorded by the trial court are correct and the same are based on proper appreciation of evidence on record and interference with the same and setting aside the conviction and sentence Under Section 376 of the Code in so far as the Respondent herein is concerned, is bad in law. The same is liable to be interfered with and accordingly we set aside the impugned judgment and order of the High Court and restore the order of conviction and sentence in respect of the

Respondent passed by the trial court for the charges levelled against him. Consequently, we allow this appeal.

14. The High Court while reducing the sentence from five years to three years has concurred with the finding of conviction on the charge Under Section 366 of the Code. Since we are restoring the judgment of the trial of conviction and sentence on the charge and the learned District Judge has held that the sentence awarded for the offences shall run concurrently, the reduction of the sentence for offence Under Section 366 from five years to three years has no consequence.

15. The accused-Respondent shall surrender before the trial court in seisin of the matter to undergo the imprisonment imposed for the offence Under Section 376 of the Code. The appeal is allowed in the aforesaid terms.