

KAILASH @ TANTI BANJARA

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v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1962 of 2010)

APRIL 10, 2013

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**[DR. B.S. CHAUHAN AND FAKKIR MOHAMED
IBRAHIM KALIFULLA, JJ.]**

Penal Code, 1860 - ss. 376 and 506B - Rape - Courts below though found that the intercourse was with the consent of prosecutrix, but convicted him finding that the prosecutrix was 14 years of age - On appeal, held: Conviction justified - In view of the conclusion that the prosecutrix was in the age group of 13-14 years, consent of the prosecutrix has no consequence.

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Vijay @ Chinee vs. State of Madhya Pradesh (2010) 8 SCC 191: 2010 (8) SCR 1150 - relied on.

Case Law Reference:

2010 (8) SCR 1150 relied on Para 5

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1962 of 2010.

From the Judgment and Order dated 09.10.2009 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 1395 of 1994.

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Rajeev Kumar Bansal, M.P. Singh, Akshay K. Ghai for the Appellant.

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Vibha Datta Makhija for the Respondent.

The following Order of the Court was delivered

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O R D E R

1. This appeal is directed against the impugned judgment of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.1395/1994 by which the conviction and sentence imposed on the appellant under Section 376 IPC to undergo rigorous imprisonment for seven years apart from a fine amount of Rs.500/- and in default of payment of fine, to under one months' additional rigorous imprisonment was confirmed.

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2. According to the prosecution on 11.4.1991 the victim P.W.4, an agricultural labourer was in the field of Moti Singh Darbar and loading the wheat on the vehicle. After the field work, she was proceeding to her village which was 1½ miles away. The appellant was following P.W.4 who was proceeding alongwith minor girl Manju, aged 10 years in his motorcycle. On the way, P.W.4 suffered thorn bite in her foot and while she was removing the thorn, Manju left her and proceeded towards her home. Taking advantage of the loneliness of P.W.4, the appellant stated to have grabbed her hand against her will, took her near the bushes at Kauve near the drain and had forcible sexual intercourse for about ½ an hour. According to the victim P.W.4, sexual intercourse was carried out by the appellant near the drain and again after taking her to his house under the threat of knife point and performed the same evil act in the house also. Subsequently at about 3.00 in the midnight, he took her in his motorcycle and dropped near the community well and after threatening her at knife point that if she reveal any of the act committed by him, she would kill her, left that place. P.W.4 felt humiliated and having ashamed of loss of modesty, jumped into the community well while the appellant stated to have fled away from that place. Though P.W.4 jumped into the well, according to her, she was able to grab the rope which was present inside the well and she cried for help. On hearing her distress call, the villagers stated to have turned up and rescued her. Thereafter, her father and grand father stated to have reached that place whereafter she was taken to her house and after change of

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cloth she went to the Police Station and lodged the FIR.

3. The appellant was charged for the offence under Section 376 read with Section 506 B,IPC. The trial Court after a detailed consideration of the evidence placed before it concluded that the FSL report, Exhibit P.14 established that in the peticoat of P.W.4, in her private parts as well as the vagina, human sperms was found present and therefore the plea of ignorance pleaded by the appellant was not true. The trial court however, concluded that the intercourse was with the consent of P.W.4. Based on the expert evidence and applying the principles for ascertaining the age of the victim, the trial court has concluded as under:

"14. For ascertaining the age the position of gums, private part and under arms are of great help. According to the statement of Dr. Smt. Saluja (P.W.2) 7 teeth in the right and 6 teeth in the left total 13 teeth were found in the upper jaw. In the lower jaw 7-7 teeth in the right and left sides were found. Therefore, total 14 teeth were found in the lower jaw. It is clear from the position of the teeth that third molar in the right upper jaw did come and second and third molar in the left side was not present and like this in the lower jaw third molar was not present in the right and left side. It is clear that in this situation that in absence of third molar in the jaw age was below 17 years. Therefore, according to the chart given in the Modi's book at page No.29 according to the situation of the teeth in the jaw the age of the girl must be 14 to 15 years.

4. The conclusion of the trial court was that the victim P.W.4 was aged 14 years on the date of occurrence and since sexual intercourse carried out by the appellant though with the consent fell within the four corners of the offence falling under Section 376 and convicted the appellant for the said act. The High Court having examined the case of the appellant, considered the whole gamut of the evidence placed before the trial Court, as well as, the conclusion reached by the trial court

A held that there was no scope to interfere with the conviction and sentence imposed on the appellant.

B 5. Heard Mr. Rajeev Kumar Bansal, learned counsel for the appellant and Ms. Vibha Dutta Makhija, learned counsel for the State. Learned counsel appearing for the appellant strenuously contented that the medical evidence placed before the court below did show that the victim was beyond 16 years of age, that even going by her own evidence it came out that there were serious contradictions as to the nature of offence alleged against the appellant; that the trial court has held that sexual intercourse was performed with full consent of the victim and therefore sentence imposed was liable to be interfered with. As against the above submission, learned counsel for the State by referring to the decision of this Court in *Vijay @ Chinee vs. State of Madhya Pradesh* (2010) 8 SCC 191 in C para 27, submitted that the trial court having applied the principles laid down therein based on the FSL report for the purpose of ascertaining the age of the victim having concluded that she was 14 years of age on the date of the occurrence, in D the absence of any other reliable contra evidence to dislodge E the said conclusion of the trial court as affirmed by the High Court, no interference is called for.

F 6. Having heard learned counsel for the appellant as well as for the respondent, we are also convinced that the submission of learned counsel for the State deserves to be accepted. The ascertainment of age has been done by the trial court concerned, by applying the various principles laid down by this Court. In this context, we refer to the decision of this Court in *Vijay alias Chinee*, (supra) and in which one of us (Hon'ble Chauhan, J.) was a party. We have held in paragraphs G 27 to 30 as under:

"Determination of Age

H 27. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by

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examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

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Teeth- (Dental - Age)

28. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

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Central incisors	- 6th to 8th year
Lateral incisors	- 7th to 9th year
Canines	- 11th to 12th year
Second Molars	- 12th to 14th year
Third Molars or Wisdom Teeth	- 17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

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Secondary Sex Characters

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29. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

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a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

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c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

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- A 30. The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:
- B i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.
- ii) More elevation and enlargement of breast and areola, but their contours are not separate.
- C iii) Areola and papilla project over the level of the breast.
- iv) Adult stage - only the papilla projects and the areola merges with the general contour of the breast.
- D In this case, it will be worthwhile to refer to the version of P.W.2 Dr. Smt. Jasbit Kaur Saluja, who examined the victim P.W.4 and in her evidence has stated the physical features of the victim and observed as under:
- E "(3) Following was the condition of the girl observed on examination:-
- Her height - 5", weight - 43 Kgs., normal build, 13 teeth in the upper jaw and 14 in the lower jaw present, hair in armpit had not grown, breast was development, slight pubic hair were noticed."
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- Ultimately, she has opined in paragraph 14 and 17 that the victim appears to be 14 to 16 years. The High Court in paragraph 9 again considered the said aspect of evidence of
- G P.W.2 and noted as under:
- H "9. Accordingly, the margin or error could be \pm 6 months. This apart, the radiological age, being probably, has to be verified in the face of age-related other evidence on record (*State of H.P. V. Mange Ram* AIR 2000 SC 2798 referred

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to). Viewing from this angle, the following physical features described by Dr. Jasbeer Kaur Saluja were sufficient to fortify her assessment that the prosecutrix was between 14 to 16 years of age:- A

(i) Auxiliary hair not appeared. B

(ii) Public hair scanty.

(iii) Menarche attained 1 years back.

(iv) Teeth - C

$$\frac{7 + 6}{7 + 7} = 27$$

Considering these findings of anthropological and dental examinations, learned trial Judge did not commit any error in holding that age of the prosecutrix was about 14 years only (See *Bishnudayal v. State of Bihar* AIR 1981 SC 39)." D

7. In paragraph 30 of the decision in *Vijay alias Chinee*, (supra), this Court has held by making specific reference to the growth of breast in a girl between the age group of 13 and 14 and has specifically referred to the extent at which such growth could be found, while in paragraph 28 based on the eruption of teeth, the age of a person can be ascertained. Again, in paragraph 29 this Court has noted the ascertainment of age based on the growth of pubic hair by which the age of the person can be scientifically arrived. E F

8. When we apply the above principles laid down by this Court with particular reference to the consideration made by the trial court in paragraph 14, the evidence of doctor P.W.2 as well as the conclusion arrived at by the High Court in paragraph 9, we are convinced with the conclusion that P.W.4 was in the age group of 13/14 years. Once the said conclusion G H

- A cannot be altered the sexual intercourse indulged in by the appellant was with the consent of P.W.4 will be of no consequence. Having regard to the above said conclusion, we do not find any scope to find fault with the conviction and sentence imposed by the trial court as confirmed by the High Court in the impugned judgment in this appeal.
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The appeal lacks merit and the same is dismissed.

K.K.T.

Appeal dismissed.