

A STATE OF MADHYA PRADESH

v.

ANOOP SINGH

B Criminal Appeal No. 442 of 2010

JULY 03, 2015

**[PINAKI CHANDRA GHOSE AND
UDAY UMESH LALIT, JJ]**

C *Penal Code, 1860 – ss. 363, 366 and 376 – Offence of*
kidnapping and rape – Age of prosecutrix, determination of
– Conviction of respondent u/ss. 363, 366 and 376 for
commission of rape and sentenced accordingly – However,
acquittal by High Court holding that decision of the trial court
D *not sustainable since the prosecution failed to prove that*
the girl was less than 16 years of age at the time of the
incident – On appeal, held: Discrepancy of two days in the
two documents-Birth Certificate and Middle School
Examination Certificate adduced by the prosecution is
E *immaterial – These documents which support the case of*
the prosecutrix that she was below 16 years of age at the
time the incident took place and can be used for ascertaining
the age of the prosecutrix as per r. 12(3)(b) – High Court
should have relied firstly on the documents as stipulated u/
F *r. 12(3)(b) and only in the absence, the medical opinion*
should have been sought – Trial court rightly held that the
ossification test is not the sole criteria for determination of
the date of birth of the prosecutrix as her certificate of birth
and also the certificate of her medical examination had been
G *enclosed – Thus, in view the medical examination reports,*
statements of the prosecution witnesses which inspire
confidence and the certificates proving the age of the
prosecutrix to be below 16 years of age on the date of the
H *incident, order of acquittal passed by the High Court is set*

aside and the judgment and order by the trial court is upheld A
– *Juvenile Justice (Care and Protection of Children) Rules, 2007 – r. 12(3).*

Mahadeo S/o Kerba Maske vs. State of Maharashtra and Anr. (2013) 14 SCC 637; Lakhan Lal vs. State of M.P. 2004 Cri.L.J. 3962 – referred to. B

Case Law Reference

(2013) 14 SCC 637 referred to. Para 12 C
2004 Cri.L.J. 3962 referred to. Para 15

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 442 of 2010.

From the Judgment and Order dated 10.07.2008 in D
Criminal Appeal No. 924 of 2006 of the High Court of Madhya Pradesh at Jabalpur.

Naveen Sharma, Mishra Saurabh for the Appellant.

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

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. 1. The present Criminal F
Appeal has been preferred against the judgment and order dated 10.07.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.924 of 2006, whereby the High Court set aside the judgment of conviction and order of sentence passed by the learned Trial Court G
and acquitted the accused from all the charges levelled against him.

2. The facts of the present matter are that on H
03.01.2003, at about 10:30 A.M. the prosecutrix was going

A to school along with her sister. On realizing that she had left
behind her practical note book, she returned back and after
taking the said note book she once again headed towards
the school. When she reached near Tar Badi (wire fencing)
near Hawaii Patti, there was an Ambassador car standing
B there and as alleged, the accused respondent came out of
the car, pulled the prosecutrix inside the car and forced her
to smell something, as a result of which the prosecutrix
became unconscious. As alleged by the prosecution, the
prosecutrix was taken to some unknown place thereafter.
C

3. On regaining consciousness, the prosecutrix felt pain
in her private parts. On the same day, she was admitted in
the District Hospital, Satna in an unconscious condition and
information about the incident was given to Laxmikant
D Sharma (P.W.8), the uncle of the prosecutrix. On 10.01.2003,
the prosecutrix was discharged from the Hospital and sent
back to her home where she narrated the incident and
thereafter an F.I.R was lodged. During the course of
investigation, the prosecutrix was sent for medical
E examination and her clothes were seized and slides were
prepared. After receipt of the medical report, F.I.R was
registered and site map of the spot was prepared. The
Investigating Officer seized various articles which included
F the prosecutrix's birth certificate and certificate of the Middle
School Examination, 2001. Along with that the relevant page
(page No. 20) of the register of the U.S.A Hotel was also
seized. After due investigation a charge-sheet was filed
against the respondent for offences under Sections 363, 366
and 376 of the Indian Penal Code, 1860 ("I.P.C.") and the
G statements of the prosecution witnesses were recorded.

4. On 27.03.2003, the Judicial Magistrate, First Class
Satna registered the Criminal Case No.116/2003 and passed
the committal order. Accordingly, the case was transferred
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and was received by the Upper District Sessions Judge-III, A
Satna for trial.

5. The IIIrd Additional Sessions Judge, Satna, by his
order dated 24.04.2006 passed in Special Case No.123/
2003, convicted the accused under Sections 363, 366 and B
376 of I.P.C. and held that all the offences against the
respondent were proved beyond reasonable doubt. The
respondent was awarded 7 years' rigorous imprisonment and
fine of Rs.500/- for the crime under Section 363 I.P.C., 10
years' rigorous imprisonment and fine of Rs.1000/- for the C
crime under Section 366 I.P.C., and 10 years' rigorous
imprisonment and fine of Rs.1000/- for the crime under
Section 376 I.P.C. with default clauses. All the substantive
sentences were directed to run concurrently.

6. Aggrieved by the aforesaid judgment and order
passed by the IIIrd Additional Sessions Judge, Satna, the
respondent preferred an appeal under Section 374(2) of
Cr.P.C. before the High Court of Madhya Pradesh at Jabalpur,
which was numbered as Criminal Appeal No.924 of 2006. E
The learned Single Judge of the High Court, by impugned
judgment and order dated 10.07.2008, set aside the
judgment and order of conviction passed by the Trial Court
against the respondent. The High Court ruled that the
decision of the Trial Court was not sustainable solely on the F
ground that the prosecution had failed to prove the fact that
the girl was less than 16 years of age at the time of the
incident. The reasons that weighed heavily with the ruling of
the High Court were that, either the public prosecutor or P.W.7
Pramod Kumar Sharma (father of the prosecutrix) tried to G
file Ext. P/5 which was not part of the charge-sheet. Such
type of evidence could not be created by any person except
the Investigation Officer. It was for the prosecution to show
that a particular document was taken on record during H

A investigation but could not be filed. The prosecution could
not create any new evidence which was not part of the
investigation. Ext. P/5 and Ext. P/6 have variation in the date
of birth of the prosecutrix. In certificate Ext.P/5 the date of
B Ext.P/6 it has been disclosed as 27.8.1987. The High Court
found this sufficient to disbelieve that the prosecutrix was
below 16 years of age at the time of the incident. The High
Court relied on the statement of PW-11 Dr. A.K. Saraf who
C took the X-ray of the prosecutrix and on the basis of the
ossification test, came to the conclusion that the age of the
prosecutrix was more than 15 years but less than 18 years.
Considering this the High Court presumed that the girl was
more than 18 years of age at the time of the incident. The
D last ground taken by the High Court was that the girl was a
consenting party and was more than 18 years of age at the
time of the incident and thus, no offence against the accused
has been proved.

E 7. We have heard the learned counsel appearing for
the parties.

F 8. Before us, learned counsel for the State of Madhya
Pradesh has raised the contention that the High Court gave
undue importance to the difference of two days in the date
of birth of the prosecutrix as per the birth certificate and the
certificate of the Middle School Examination 2001, and
erroneously held that this difference is sufficient to disbelieve
G the age of the prosecutrix. Further, the High Court ought to
have appreciated the law laid down by this Court that
regarding the determination of age, the birth certificate is
the determining evidence.

H 9. The learned counsel appearing for the respondent,
on the other hand, argued that the prosecution story is

concocted as her evidence is not corroborated by the A
evidence of P.W.9 Jagdish Gupta, the Manager of the Hotel.
Further, the respondent states that the prosecutrix did not
give any resistance and there were no injury marks, which
make it clear that she was a consenting party. In addition, B
the learned counsel argued that the prosecution did not
explain as to why the Investigating Officer did not seize the
birth certificate during the course of investigation.

10. We believe that the present case involves only one C
issue for this Court to be considered, which is regarding the
determination of the age of the prosecutrix.

11. In the present case, the central question is whether
the prosecutrix was below 16 years of age at the time of the
incident. The prosecution in support of their case adduced D
two certificates, which were the birth certificate and the middle
school certificate. The date of birth of the prosecutrix has
been shown as 29.08.1987 in the Birth Certificate (Ext. P/
5), while the date of birth is shown as 27.08.1987 in the
Middle School Examination Certificate. There is a difference E
of just two days in the dates mentioned in the
abovementioned Exhibits. The Trial Court has rightly
observed that the birth certificate Ext. P/5 clearly shows that
the registration regarding the birth was made on 30.10.1987
and keeping in view the fact that registration was made within F
2 months of the birth, it could not be guessed that the
prosecutrix was shown as under-aged in view of the
possibility of the incident in question. We are of the view
that the discrepancy of two days in the two documents
adduced by the prosecution is immaterial and the High Court G
was wrong in presuming that the documents could not be
relied upon in determining the age of the prosecutrix.

12. This Court in the case of *Mahadeo S/o Kerba* H

A ***Maske Vs. State of Maharashtra and Anr.***, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

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“Rule 12(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 seeking evidence by obtaining –

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

D

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

E

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

F

(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.

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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

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finding in respect of his age and either of 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.” A

13. This Court further held in paragraph 12 of *Mahadeo S/o Kerba Maske* (supra) as under: B

“Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.” C D

(Emphasis supplied)

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, this Court observed: E

“In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold F G H

A that the prosecutrix was below 18 years of age at the
time of occurrence was perfectly justified and we do
not find any grounds to interfere with the same.”

14. In the present case, we have before us two
B documents which support the case of the prosecutrix that
she was below 16 years of age at the time the incident took
place. These documents can be used for ascertaining the
age of the prosecutrix as per Rule 12(3)(b). The difference
of two days in the dates, in our considered view, is immaterial
C and just on this minor discrepancy, the evidence in the form
of Exts. P/5 and P/6 cannot be discarded. Therefore, the
Trial Court was correct in relying on the documents.

15. The High Court also relied on the statement of PW-
D 11 Dr. A.K. Saraf who took the X-ray of the prosecutrix and
on the basis of the ossification test, came to the conclusion
that the age of the prosecutrix was more than 15 years but
less than 18 years. Considering this the High Court presumed
that the girl was more than 18 years of age at the time of the
E incident. With respect to this finding of the High Court, we
are of the opinion that the High Court should have relied
firstly on the documents as stipulated under Rule 12(3)(b)
and only in the absence, the medical opinion should have
been sought. We find that the Trial Court has also dealt with
F this aspect of the ossification test. The Trial Court noted that
the respondent had cited *Lakhan Lal Vs. State of M.P.*,
2004 Cri.L.J. 3962, wherein the High Court of Madhya
Pradesh said that where the doctor having examined the
prosecutrix and found her to be below 18½ years, then
G keeping in mind the variation of two years, the accused
should be given the benefit of doubt. Thereafter, the Trial
Court rightly held that in the present case the ossification
test is not the sole criteria for determination of the date of
H birth of the prosecutrix as her certificate of birth and also the

certificate of her medical examination had been enclosed. A

16. Thus, keeping in view the medical examination reports, the statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment passed by the High Court and uphold the judgment and order dated 24.04.2006 passed by the Illrd Additional Sessions Judge, Satna in Special Case No.123/2003. B

17. Accordingly, this appeal is allowed. We direct that the respondent shall be taken into custody forthwith to serve out the sentence. C

Nidhi Jain

Appeal allowed. D