

(2001) 12 MP CK 0011

**Madhya Pradesh High Court (Indore Bench)****Case No:** Criminal Appeal No. 71/93

Bapulal and Another

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision:** Dec. 14, 2001**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 363, 366, 376

**Citation:** (2002) 3 MPHT 70**Hon'ble Judges:** S.L. Kochar, J**Bench:** Single Bench**Advocate:** Ganesh Verma, for the Appellant; A. Salim, Panel Lawyer, for the Respondent**Final Decision:** Allowed

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**Judgement**

S.L. Kochar, J.

Both these appellants have preferred this appeal against the judgment and findings dated 3-2-1993, passed by 1st Additional Sessions Judge, Neemuch District Mandsaur in Sessions Trial No. 291/91 thereby convicting appellant No. 1 Bapulal for the offence punishable under Sections 363, 366 and 376, IPC and sentencing him RI for 4 years with fine of Rs. 500/-; RI for 7 years with fine of Rs. 1000/- and RI for 10 years with fine of Rs. 2000/- respectively and appellant No. 2 Shaligram for the offence punishable under Sections 363, 366 and 376(1)(g), IPC and sentencing him RI for 4 years with fine of Rs. 500/-; RI for 7 years with fine of Rs. 1000/- and RI for 10 years with fine of Rs. 2000/- respectively. In default of payment of fine, both the appellants were directed to suffer six months and one month RI for the offence under Sections 363, 366 and 376, IPC respectively. All sentences were directed to run concurrently.

2. The prosecution case in brief, before the Trial Court, was that on 20th May, 1991, a report was lodged by Mangilal (P.W. 6) father of the prosecutrix Gangabai about her missing, in the police station, which was recorded in Rajnamcha Sanha. As per

this report, when they reached at their house after working from the field, prosecutrix, Gangabai (P.W. 10) was not available in the house. On this report, the police started search and found that the prosecutrix was abducted on a motorcycle by the appellants on 25th of May, 1991. She was abducted with a view to get married with appellant No. 1 Bapulal on false pretext. After some days, the prosecutrix was recovered and according to her statement, appellant No. 1 Bapulal, who was the brother-in-law of the sister of the prosecutrix, had ravished her against her consent and Will. According to the prosecution, the prosecutrix was minor and for ascertaining the age, she was medically examined by Radiologist Dr. Govind Lal (P.W. 9). His report is Exh. P-9. After investigation, charge-sheet was filed.

3. The Trial Court framed charges against the appellants for the aforesaid offences. The appellants abjured their guilt and the defence of the appellant No. 1 Bapulal was that the prosecutrix was the consenting party and went with him at her own accord whereas the defence of the appellant No. 2 Shaligram was one of the denial.

4. Learned Counsel for the appellants vehemently argued that the prosecution is not able to establish by adducing cogent and reliable evidence that the prosecutrix was minor on the date of the incident. Her conduct is clearly showing that she was the consenting party. According to the affidavit Ex. D-3, which was duly sworn by the prosecutrix before Shyam Samdhani (D. W. 1) and notary Harishchandra (D. W. 2) to the effect that she was 19 years of age and by such affidavit, she had got married with appellant No. 1 Bapulal. On the other hand, learned Panel Lawyer appearing for the State has contended that the prosecutrix was minor and below 16 years of age as held by the Trial Court, there is no illegality or infirmity in the findings arrived at by the Trial Court. The prosecutrix was taken away from the lawful guardian on false pretext. The Counsel supported the judgment and findings of the Trial Court.

5. Having heard the learned Counsel for the parties and after going through the entire evidence available on record along with both the Advocates, this Court is of the opinion that the prosecution has failed to establish beyond reasonable doubt that the prosecutrix was below 18 years of age on the alleged date of the incident and she being a consenting party, no offence is made out against the appellants. For the purposes of consideration of the question of age of the prosecutrix, the Trial Court in Paragraph 15 of its judgment has considered the ossification test report as well as statements of Sarjubai (P.W. 11) mother of the prosecutrix and Mangilal (P.W. 6) father of the prosecutrix respectively. Mangilal (P.W. 6) in his deposition has nowhere given the date of birth. He was also not able to give dates of birth of other children. He was also not able to state as to what age he got married and after how much period, her eldest daughter Leela, son Bhagirath and other children born. According to this witness, Bhagirath is the elder brother of the prosecutrix and he was studying in a school and his date of birth was mentioned in the school certificate but the same has not been filed on the basis of which the Court may assess the age of the prosecutrix, who was younger than Bhagirath. In Paragraph 8

of the statement, he specifically stated that horoscope of the prosecutrix was got prepared by her mother and father (Grand-mother and grand-father of the prosecutrix) through one Ram Gopal Pandit resident of Village Antari but the said horoscope was neither filed in Court nor Ram Gopal Pandit was examined. According to this witness in para 9 of his statement, when the prosecutrix was recovered, on the same day in the house the Horoscope of the prosecutrix was found and the same was handed over to police but no such horoscope has been filed along with the charge-sheet. Though this witness has stated in Paragraph 4 of his statement that on the alleged date of the incident, the prosecutrix was 14 years of age but for substantiating this version, this witness is not able to give any positive and confirmative evidence for arriving at the conclusion that the prosecutrix was minor on the alleged date of the incident.

6. Sarjubai (P.W. 11) mother of the prosecutrix has also stated that prosecutrix was 14 years of age but she was not able to give date of birth. In Paragraph 4 of her statement she stated that she was unable to give the year of the birth of the prosecutrix. She further stated that she gave birth to child in every three years but she was unable to remember their ages. This witness was also not able to state the year of her marriage and how many years have elapsed after performance of her marriage on the date of her deposition. So the statements of Sarjubai (P.W. 11) and Mangilal (P.W. 6) are not sufficient for holding that the prosecutrix was 14 years of age or even minor on the alleged date of incident.

7. This Court has left with the evidence of Dr. Govind Lal (P.W. 9) who was opined about the age of the prosecutrix on the basis of ossification test. The law is well settled that the evidence of experts is merely an opinion. In this case, doctor has admitted in Paragraph 3 that he was not able to say in age third molar is grown up. According to this witness, fusion of joints of bones takes place in different age in different States. The witness also deposed that distal end of radius bone had fusion which fuses after 16 years of age. Looking to the statement of this witness, conclusively it cannot be said that she was below 18 years of age on the alleged date of the incident.

8. According to the evidence of lady doctor Mrs. Urmila Mejeji (P.W. 1) the age of the prosecutrix could be between 14 to 25 years on the date of examination. No external or internal injuries were found by this doctor on the person of the prosecutrix. Pubic hair and auxiliary hair and other organs of the prosecutrix were fully developed. In view of the statement of the lady doctor, the prosecutrix could be above 18 years of age on the alleged date of incident.

9. After careful consideration and scrutiny of the statements of mother and father of the prosecutrix as also both the doctors, this Court is unable to accept the findings of the Trial Court that the prosecutrix was below 16 years of age on the alleged date of the incident.

10. The evidence adduced by the prosecution is not sufficient to come to the conclusion that the prosecutrix was minor or below 18 years of age on the date of the incident.

11. According to the statement of the prosecutrix Gangabai (P.W. 10) she had been abducted on motorcycle and she stayed in the company of accused in the house of one Thakur for 15 days but she did not complain about her forcible kidnapping or abduction. In Paragraph 13 of her deposition, she has admitted this fact that she did not disclose before the police about her forcible abduction after threat and on false pretext. She has been contradicted with her case diary statement Ex. D-2 from "A" to "A" upto "L" to "L", so she has given almost all contradictor statements to the case diary in Court. In Paragraph 32, she has stated that for the first time, she had disclosed all events before the Court and prior to that she never disclosed all these facts to anybody. In Paragraph 33 she has admitted about non-disclosure of use of knife by the appellant before the police,

12. The prosecution has examined Narayan (P.W. 7) for the purpose that the appellant was seen by this witness on a motorcycle with a girl but the witness did not identify the girl. In Paragraph 2 he has stated that when the appellant was going on a motorcycle with a girl, the girl did not raise any alarm.

13. The appellant has examined Shyam Samdhani, Advocate (D.W. 1) who drafted affidavit Ex. D-3 and proved the same. Ex. D-3 was the copy and the original one was with the prosecutrix, Gangabai. Harishchandra (D.W. 2) was the notary before whom the affidavit Ex. D-3 was sworn by the prosecutrix. There is no reason to disbelieve these witness about swearing of affidavit by the prosecutrix.

14. The prosecutrix was in the company of appellant Bapulal for a long period and visited several places. During this period, she had sufficient time and opportunities to complain about her forcible kidnapping and abduction but she did not do so. From the conduct of the prosecutrix, it could safely be inferred that she was the consenting party. The prosecution is not able to adduce positive, cogent and reliable evidence about her age, hence, appellants are entitled to get benefit of doubt.

14-A. Accordingly, the appellants are acquitted from the aforesaid offences. If fine amount has deposited, the same be returned to them. Appellants are on bail, their bail bonds stand discharged.