

(2024) 01 CHH CK 0089
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1284 Of 2023

Laljeet Painkra

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 18-01-2024

Acts Referred:

Constitution of India, 1950 — Article 21
Juvenile Justice (Care & Protection of Children) Rules, 2007 — Rule 12, 12(3)(a), 12(3)(a)(i), 12(3)(a)(ii), 12(3)(a)(iii)
Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 437A
Indian Penal Code, 1860 — Section 363, 366, 376, 376(3)
Protection of Children from Sexual Offences Act, 2012 — Section 4, 6
Evidence Act, 1872 — Section 35
Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 9(2), 94, 94(2), 94(2)(i), 94(2)(iii)

Citation : (2024) 01 CHH CK 0089

Hon'ble Judges : Ramesh Sinha, CJ; Ravindra Kumar Agrawal, J

Bench : Division Bench

Advocate : Vikas Pandey, Avinash Singh?

Final Decision : Allowed

Judgement

Ravindra Kumar Agrawal, J

1. The appeal arise out of the judgment of conviction and sentence dated 28.11.2020 passed by Additional Sessions Judge, Gharghoda, District – Raigarh (C.G.) in Special Criminal (POCSO) Case No. 19/2018 whereby the appellant has been convicted and sentenced in the following manner:-

CONVICTION

SENTENCE

PUNISHMENT IN DEFAULT OF PAYMENT OF FINE

Section 363 of IPC

R.I for 5 years with fine of Rs. 2000/-

R.I. for one year

Section 376(3) of I.P.C.

R.I for life with fine of Rs. 15,000/-

R.I. for two years

Section 6 of POCSO Act

No separate sentence has been awarded.

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All the sentences are directed to run concurrently.

2. In the present case there are three accused persons. The appellant Laljeet Painkara has been convicted for the offence under Sections 363, 376(3) of IPC and Section 6 of POCSO Act whereas the other two accused persons namely Jay Kumar Raut and Ramnath have been convicted for the offence under Section 363 of IPC and sentenced them for the period already undergone by them i.e. 2 months 11 days with fine of Rs. 2000/- in default of payment of fine further R.I. for one year. The other accused persons namely Jay Kumar Raut and Ramnath have already undergone their sentences and have not been preferred any appeal.

3. Brief facts of the case are that, on 31.07.2018 the father of the prosecutrix (PW-2) has lodged a report to the police station Lailunga, District – Raigarh with the effect that he is residing at village Handipani and having three children. His elder daughter is aged about 15 years. On 30.07.2018, he and his wife went to the field and his daughter went to the Middle School Handipani for cooking food and when they returned back from the field at about 2:00 P.M., they found their daughter has not returned from the school and when he went to her school for her search she was not found there. During her search he met with one Gurucharan Raut, he told him that he saw his daughter was going with Laljeet Painkra in his motorcycle at about 11:00 A.M. Thereafter he lodged a report that the appellant has allured his daughter and abducted her. On the report of the (PW-2), the father of the prosecutrix the police has registered the FIR under Section 363 and 366 of IPC vide (Ex.P/4) against the appellant and started investigation. On 16.08.2018 the prosecutrix was recovered from the possession of the appellant and recovery panchanama (Ex-P/1) was prepared. The prosecutrix was sent for her medical examination to CHC Lailunga, since there was no lady doctor available at CHC Lailunga, she was referred to the District Hospital, Raigarh from where Dr. Sushma Ekka has examined her and gave a report Ex-P/8(A). While examining the prosecutrix the doctor has not found any external or internal injury over her body and opined that no recent sign of injury present and no definite opinion can be given regarding sexual assault. Two glass slides from her vaginal secretion was prepared, sealed and handed over to the police for its FSL examination. The prosecutrix was refereed to radiologist for

confirmation of her age. Spot map (Ex.P/5) was prepared. The school admission and discharge register from Primary School Handipani with respect to the date of birth of the prosecutrix was also seized by the police. The attested true copy of the school admission and discharge register is Ex.P/7(C) in which date of birth of the prosecutrix is mentioned as 08.05.2003.

4. Two glass slides prepared from vaginal secretion of the prosecutrix was sent for FSL examination from where report has been received in which no sperm and semen were found. The statement under Section 164 of Cr.P.C. of the prosecutrix was recorded on 08.09.2018. After recording statement of the witnesses under Section 161 of Cr.P.C. and completion of investigation, charge-sheet was filed for the offence under Sections 363, 366 and 376 of the IPC and Section 4 and 6 of POCSO Act against the appellant and two other co-accused persons.

5. The learned trial Court has framed charges against the appellant for offences under Sections 363, 366, 376(3) of IPC and Section 6 of POCSO Act whereas the charges under section 363, has been framed against the two other co-accused persons namely Jaikumar Raut and Ramnath. The accused persons abjured their guilt, plead and claimed trial.

6. In order to establish the charges against the accused persons the prosecution has examined 12 witnesses. The statement under Section 313 of Cr.P.C. the accused persons have been recorded in which they plead innocence. After appreciation of the evidence available on record the trial Court has convicted the appellant and other accused persons and sentenced them as mentioned in paragraph 1 and 2 of this judgment, hence this appeal.

7. Learned counsel for the appellant would submit that the appellant is innocent and has been falsely implicated in this offence. No offences are made out against the appellant as alleged. The prosecution has failed to prove their case beyond reasonable doubt. There is no legally admissible evidence regarding age of the prosecutrix that on the date of incident she was minor and less than 18 years of age except the School admission and discharge register no other document like kotwari register or birth certificate or even the ossification test report has been filed by the prosecution to determine her age. Despite having referred her ossification test, she has not been examined by the doctor and no ossification test was being produced. The basis on which the entry of date of birth of the prosecutrix has been made in the school register is not being proved. The said school admission and discharge register is sought to be proved by PW-8 Doyla Ram Lakda who is not author of the said school admission and discharge register. In absence of any clinching and cogent evidence the school admission and discharge register can not be considered for determination of the age of the prosecutrix in which her date of birth is said to have been correctly recorded. He would further argue that the prosecutrix has never made any complaint against the appellant while going with the appellant on his motorcycle from one place to another. No alarm was raised at the time of alleged commission of rape. Even if any act of sexual relation was being made by the appellant with the prosecutrix,

the same was consensual, which does not come under the definition of rape hence, the alleged offence of the IPC and POCSO Act are not made out against the appellant and he is entitled for acquittal.

8. On the other hand, learned counsel for the State opposes the argument advanced by the learned counsel for the appellant and submitted that the prosecutrix was minor and below 18 years of age at the time of incident which has been proved by the school admission and discharge register Ex.P/7 (C). The school admission and discharge register is an admissible piece of evidence to determine the age of the prosecutrix and same has been proved by PW-8, Doyla Ram Lakda, who is the in-charge Headmaster of the school. The evidence of the prosecutrix needs no corroboration and her sole testimony, conviction can be made. Therefore, there is no illegality or infirmity in the findings of the learned trial Court. The prosecutrix who was minor on the date of incident, was abducted by the appellant and kept away from her lawful guardianship of her parents. Therefore, the impugned judgment of conviction and sentences needs no interference.

9. We have heard learned counsel for the parties and perused the records.

10. With regard to the age of the prosecutrix the prosecution has mainly relied upon the school admission and discharge register Ex.P/7(C) and the statement of (PW-8), Doyla Ram Lakda who is the in-charge headmaster of the School. (PW-8) has stated in his deposition, he is in-charge headmaster of the Government Primary School Handipani from September 2008. The police has asked for school admission and discharge register with respect to the date of birth of the prosecutrix and the memo of (Ex/P/6). He has submitted the school admission and discharge register before the police. After retaining the attested true copy the original copy of the school register returned and today he came alongwith the original register in which the date of birth of the prosecutrix is mentioned as 08.05.2003 which is recorded in serial No. 253 of the register and the attested true copy is Ex.P7 (C). In cross examination this witness has admitted on the date when the prosecutrix has got admitted in the school, he was not posted there. He further admitted that at the time of admission of prosecutrix in the school what documents submitted by her parents, there is no endorsement in the register about that. He further admitted that he narrated the date of birth of the prosecutrix on the basis of entry made in the school register.

11. The (PW-1) prosecutrix has stated in her deposition she born in the year 2003, she has not disclosed her date of birth. In cross examination she has stated that she has passed class 9th examination two years back. She further stated that she could not know the age of her younger brothers. The (PW-2) father of the prosecutrix has not stated anything in his deposition regarding age or date of birth of the prosecutrix even he has not stated in his deposition as to whether the prosecutrix was minor on the date of incident or not. The (PW-3) mother of the prosecutrix has also not stated anything about her age or date of birth.

12. From the evidence of (PW-1) the prosecutrix (PW-2) the father of the prosecutrix and (PW-3) the mother of the prosecutrix, no date of birth of the prosecutrix has been disclosed by them it comes only the year of her birth in statement of the prosecutrix that her year of birth is 2003. The school register Ex.P/7 (C) contains with the date of birth as 08.05.2003 and what basis the same was recorded has not been proved. The (PW-2) the author of the said school register. The prosecutrix has not produced any ossification test report with respect to age of the prosecutrix.

13. The Hon'ble Supreme Court in the matter of Sunil v. State of Haryana, 2010 Vol 1SCC742, has held in para 26 as under:-

"26. Bishan, PW 8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date.

34. On consideration of the totality of the facts and circumstances of this case, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefits of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case."

14. The Hon'ble Supreme Court in the matter of State of Madhya Pradesh v. Munna @ Shambhoo Nath has held as under:-

"9.....Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent.

11. In view of the evidence on record and the rationale in the aforementioned cases, we are of a considered view that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, it can be held that the girl was more than 16 years of age and she was competent to give her consent as held by the High Court. Hence, in the present case, the question of rape does not arise as consensual intercourse has been proved.

15. In case of Alamelu and Another Vs. State, represented by Inspector of Police, 2011(2) SCC-385, the Hon'ble Supreme Court has held that the transfer certificate which is issued by government school and is duly signed by the

Headmaster would be admissible in evidence under Section 35 of the Evidence Act 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of any material on the basis of which the age was recorded. The Hon'ble Supreme court held that the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

2. In paragraphs 40,42,43,44 and 48 of its judgment in *Alamelu (Supra)*, the Supreme Court has observed as under :

"40.Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*¹, observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined....Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of *Narbada*

Devi Gupta Vs. Birendra Kumar Jaiswal², where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of Ravinder Singh Gorkhi Vs. State of U.P.⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

16. In case of Rishipal Singh Solanki Vs. State of Uttar Pradesh & Others, 2022 (8) SCC 602, while considering various judgments, the Hon'ble Supreme Court has observed in para 33 as under :

"33. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

33.2.2. If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub- section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

XXXX XXXX XXX

33.3. That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

33.4. The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

33.5. That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7 This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions. 33.11. Ossification Test

cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015.”

17. Recently, in case of *P. Yuvaprakash Vs. State* represented by Inspector of Police, 2023 (SCC Online) SC 846, Hon’ble Supreme Court has held in para 14 to 17 as under :

“14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2) (i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in *Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors.* this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to

declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in *Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors* that:

"Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the 2021 (12) SCR 502 [2019] 9 SCR 735 concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2) (a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal*, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference."

18. Reverting of the fact of the present case although the date of birth of the prosecutrix is mentioned in the school register as 08.05.2003 and on that basis on the date of incident the age of prosecutrix appears to be below 18 years but as has been observed in presiding paragraphs that there is no evidence on the basis of which the date of birth of the prosecutrix is recorded in the year school register the same can not be taken into consider to hold that on the date of incident the prosecutrix was minor. Even the parents of the prosecutrix neither have stated her date of birth nor any approximate age the prosecutrix herself unable to state her date of birth. Despite having referred by the doctor for her ossification test report, the police has not conducted her ossification test and there was no any Kotwari register and birth certificate also. Therefore, it would not be safe to hold that the prosecutrix was minor on the date of incident. Therefore, we set aside the findings of the trial Court that on the date of incident the prosecutrix was minor and below 18 years of age.

19. So far as the allegation of forceful sexual intercourse is concerned the prosecutrix (PW-1) has stated in his deposition that on the date of incident she went alongwith the appellant in his car to Chandrapur temple. Her neighbor Meera and her two younger brothers were also accompanied with them. In the

evening all of them stay there in the hotel room which has already been taken on rent by the appellant, Meera and her younger brother stayed in one room and appellant has taken her in another room and committed forceful intercourse with her. He committed forceful intercourse twice in the night. On the next day at about 2:00 P.M. they proceeded for returning to her village. She has not disclosed about the incident to her parents or other family members. After about two-three months of this incident, when she was going to the handpump for water which was required to cooking food in the school, the appellant came there on his motorcycle and forcefully taken her to village Sarda (Odisha) and kept her in the house of his friend. Thereafter, the appellant and his friend have taken her to village Navagaon in the house of one Ramnath. It is Ramnath who has stated her that he is going to inform her parents that she is at his house. After some time Ramnath alongwith her elder father who is also the residence of village Sarda has came there and asked to go back her house but the appellant protested and taken her to village Turtura by his motorcycle. In the village Turtura the appellant has kept her in a room for about three days and committed sexual intercourse with her thereafter, he has taken to village khajri where she was kept for about nine days and regularly committed sexual intercourse with her. After about nine days her father and uncles were came to village Khajri and taken them to her house. On the next day the police came there and taken the appellant alongwith them. In cross examination the prosecutrix has admitted that the appellant is a tractor driver and in his tractor, her mother as usually gone to her labour work. She has stated that she has not disclosed the fact to her parents that they went to village Chandrapur. She admitted in her cross examination that at the time when the appellant was making physical relation with her she was not shouted and she has not informed the incident to her parents and brothers.

20. From the evidence of the prosecutrix, it appears that she was moving with the appellant from one place to another. In the village Sarda also her elder father met with her but she has not made any complaint to him that she was being abducted by the appellant or she was being subjected to rape by the appellant. Had she been disclosed these facts to her elder father he would certainly taken the police help or help of other villagers and to rescue the prosecutrix while traveling from one village to another alongwith the appellant. She has not raised any alarm and has not shouted so that the villagers can rescued her. The place on which she was allegedly kept by the appellant, is residential place where so many villagers are therein adjoining houses. Had she been raised any hue and cry at the time commission of rape the residents of adjoining houses certainly be gathered there and rescued the prosecutrix. In absence of all these circumstances it cannot be said that she was forcibly taken by the appellant and committed sexual forceful intercourse with her. At the time of her medical examination the doctor has not found any internal or external injury over the body of the prosecutrix even there is no science of struggle or protest were found. The parents of the prosecutrix (PW-2) and (PW-3) have also not been

stated in their deposition that the prosecutrix was subjected to forceful sexual intercourse by the appellant they are only stated that they are being informed that the appellant has taken their daughter on his motorcycle there is no statement with respect to the fact that the prosecutrix has informed them about forceful intercourse committed by appellant with her. (PW-4) Gurucharan Yadav and (PW-5) Siyanand Paikra have also not been stated anything that the prosecutrix has narrated them about the incident of forceful sexual intercourse committed by the appellant with her they have only stated that the appellant has taken the prosecutrix on his motorcycle. (PW-6) Gajanand Paikra, who is the uncle of prosecutrix who has also not been stated against the appellant except that the appellant has taken the prosecutrix with him.

21. Close scrutiny of the evidence makes it clear that the prosecutrix was consenting party in making physical relation with the appellant and has not made any complaint to any person nearby places and not shouted for help. She has not disclosed about the incident to any of her relatives or parents.

22. Considering the entire evidence available on record the evidence with regard to age and conduct of the prosecutrix we are of the opinion the prosecution has failed to prove that the prosecutrix was less than 18 years of age at the time of incident. Further she was a consenting party with the appellant in making physical relation with the appellant therefore, in the above facts and circumstances of the case, the offences of Section 363 and 376(3) of IPC and Section 6 of POCSO Act are not made out against the appellant.

23. For the foregoing reasons the appeal is allowed. The judgment and conviction and order of sentence dated 28.11.2020 is set aside. The appellant stands acquitted from all the charges. The appellant is reported to be in jail since 18.08.2018 he be released forthwith if not required in any other case.

24. Keeping in view the provisions of Section 437-A CrPC, the appellant is directed to forthwith furnish a personal bond in terms of Form No.45 prescribed in the Code of Criminal Procedure of sum of Rs.25,000/- with two reliable sureties in the like amount before the Court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

25. The lower court record along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.