

**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR  
BEFORE  
HON'BLE SHRI JUSTICE ROHIT ARYA  
&  
HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE  
CRIMINAL APPEAL No.9106 of 2018**

**Between:-**

**BANWARI**

**.....APPELLANT**

**(BY SHRI SAMEER KUMAR SHRIVASTAVA -  
ADVOCATE)**

**AND**

**STATE OF MADHYA PRADESH  
THROUGH POLICE STATION DABRA  
DISTRICT GWALIOR (MADHYA  
PRADESH)**

**.....RESPONDENT**

**(BY SHRI NAVAL KUMAR GUPTA – GOVERNMENT  
ADOVCATE )**

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Reserved on 30.06.2022

Delivered on 27.10.2022

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*This appeal coming on for hearing this day, Hon'ble Shri  
Justice Milind Ramesh Phadke, passed the following:*

**JUDGMENT**

(1) The present appeal had been directed against the judgment of conviction and order of sentence dated 26/10/2018 passed in Sessions Trial No.69/2016 by the Special Judge, Protection of Children from Sexual Offences Act, 2012, Dabra, District Gwalior, whereby the appellant though had been held guilty and convicted under section 376(2)(i)(n), 506 IPC read with section 5 & 6 of Protection of Children from Sexual Offences Act, 2012 and had been sentenced to undergo life imprisonment for his entire natural life with a fine of Rs.5,000/- under section 376(2)(i)(n) IPC and in the event of default in depositing the fine amount had to undergo a further period of 1 year R.I, under section 506 IPC 1 year R.I and a fine of Rs.300/-, in default in depositing fine amount had to undergo a further period of 3 months R.I.

(2) The case of the prosecution in nutshell is that on 24/02/2016 prosecutrix along with Saba Rehman and Mamta Singh lodged a report with Police Station Dabra, District Gwalior that two years back when she was living with her paternal grandparents at Ambedkar Colony, Pichore Square, Dabra and as her mother had already passed away and father had contracted second marriage, one Baba, having big beard and mustaches used to visit her grandparents. Baba, who was called by her grandmother as Banwari, used to come to their house and ask her to be friends. She thought that friendship would be like handshake, so she agreed, but Baba told that this is not the way to be friends, for that you have to take all your clothes, to which she refused. One day in the night Baba took her clothes and then committed rape on her. This act was committed on her many times and every time Baba used to administer some pills and tell her that if you will take the pill you will not fall sick. He further used to threatened her for life if she would tell anybody about the incidents and when she actually got ill, she went to her maternal aunt Vandana (PW/6), who took her to her maternal grandmother's house at Khera, where she told the entire story to her maternal grandmother. Two or three days prior to her reporting of the matter, she told the incident to the Madam, who had come to Khera to meet her, who accompanied her to the Police Station to report the matter.

(3) During investigation on 25/02/2016 prosecutrix was send

for medical examination and her MLC was done vide Ex. P/4. On the same day at the behest of the prosecutrix spot map Ex. P/3 was prepared by Constable Sanjay Singh (PW/12). On 01/03/2016 the appellant was arrested vide Ex.P/10 and on 19/03/2016 slides/clothes of prosecutrix and appellant were send for Forensic Science Laboratory vide Ex. P/11. Further statements of Saba Rehman (PW/1), Mamta Singh (PW/2), maternal grandmother Uma (PW/3), Prosecutrix (PW/4), maternal Aunt Vandana (PW/6), one Baby w/o Harvilas, Bhuri w/o Ayodhya Goud, Bharti w/o Purushottam, Smt. Krishna w/o Narendra Goud, Narendra s/o Late Gulab Singh Goud (PW/7), Smt Ramshree w/o Late Gulab Singh Goud were recorded under section 161 Cr.P.C. Statement of prosecutrix under section 164 Cr.P.C. was also recorded on 25/02/2016.

(4) Both in her 161 and 164 Cr.P.C. statements she had specifically stated that the incident is of 2 years back, the appellant used to visit the house of her paternal grandparents and he used to ask her to be friends with him, to which she had accepted, as she though that friendship means shaking hands and when she offered her hand, the appellant told her that this is not the way to be friends, for becoming friends you have to remove your clothes, but she refused. In the night the appellant took her to the room upstairs and removed her clothes and committed rape on her. He further used to administer her some pills and used to say they by taking those pills she will not fell ill. The appellant then

committed rape on her number of times and threatened her of beating and for life. She tried to tell her grandparents but they didn't believe her. In the year 2015 when she fell ill, she went to the house of her maternal grandmother, wherein upon asking she narrated her, the incident. After couple of days one Saba Rehman (PW/1), Secretary of an EGO named "ROJ Sarvajana Utthan Samiti and Mamta Singh (PW/2), working in Mahila Bal Vikas, Shouryadal and Vishalha Samiti, upon receiving information came and took her to the Police Station and thereafter F.I.R. was lodged. Same story as narrated by the prosecutrix were reiterated by Saba Rehman (PW/1), Mamta Singh (PW/2), Uma (PW/3) and Vandana (PW/6) in their respective statements under section 161 Cr.P.C., which she had told to the Police, further, it was also told to them by the prosecutrix that though she had told her paternal grandparents about the incident they ignored her and didn't believed her.

(5) After investigation charge sheet was filed against the present appellant under section 376(2)(i)(n), 506 IPC read with sections 3/4, 5 (l)&(m) of Protection of Children from Sexual Offences Act, 2012 and after committal the matter was placed before the Sessions Court, but vide separate order dated 21/06/2016 charges under section 376(2)(i)(n), 506 IPC read with sections 5 & 6 of Protection of Children from Sexual Offences Act, 2012 were framed against the appellant and the Session was put to trial.

(6) In all 12 witnesses were examined by the prosecution, PW/1 Saba Rehman w/o Asad Ahmed Khan, PW/2 Mamta Singh D/o V.S. Kushwah, PW/3 Uma w/o Ramkishan, PW/4 Prosecutrix, PW/5 Dr. Asha Singh w/o Dr. A. K. Sharma, PW/6 Vandana w/o Rakesh, PW/7 Narendra s/o Gulab Singh, PW/8 Dr. D.R. Sagar s/o Late Dr. D.D. Sagar, PW/9 Ram Singh Gaur s/o Kunwar Singh Gaur, PW/10 Lalji Tripathi s/o Gangacharan, PW/11 R.P. Indoriya s/o K.C. Indoriya, PW/12 Sanjay Singh s/o Rajaram respectively.

(7) After scrutiny by learned Trial Court, the appellant herein was convicted under section 376 (2)(i)(n), 506 IPC read with sections 5 (j) & 6 of Protection of Children from Sexual Offences Act, 2012 for the aforementioned period. Aggrieved this appeal had been preferred.

### **ARGUMENTS**

(8) At the very threshold of his arguments learned counsel for the appellant submitted that the entire trial is said to have vitiated as there was total non-compliance of section 273 Cr.P.C., which speaks of “Evidence to be taken in presence of Accused”, as on 26/10/2016, 23/01/2017, 28/03/2017, 18/7/2017, 07/11/2017 and 05/10/2018, in the absence of the appellant, Saba Rehman (PW/1), Mamta Singh (PW/2), Dr. Asha Singh (PW/5), Vandana (PW/6), Narendra (PW/7), Dr. D.R. Sagar (PW/8), Lalji Tripathi (PW/10), R.P. Indoriya (PW/11) & Sanjay Singh (PW/12) were examined and cross examined, which is de hors the mandatory provisions of section 273 Cr.P.C. and since the valuable right of

the accused had been infringed, the entire proceedings had got debased and the judgment based on such proceedings is a nullity in the eyes of law. To bolster his submissions he placed reliance on a decision rendered by Division Bench of this Court in the matter of **State of Madhya Pradesh vs. Budhram reported in 1996 Cr. L.J 46 and Atmaram and others vs. State of Rajasthan reported in (2019)20 SCC 481.**

(9) Learned counsel for the appellant further argued on merits that there was no determination of age of the prosecutrix by the Trial Court as per Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007, which was required to bring the appellant under the purview of provisions of Protection of Children from Sexual Offences Act. It was further argued that to get the jurisdiction to decide a case under the POCSO Act, it is mandatory for the Trial Court to give a specific finding as regards to the victim being a “Child” as per section 2(d) of POCSO Act. No documentary evidence was collected by the prosecution to prove the age of the victim, no medical opinion was sought nor any medical test was done to assess the age of the victim, thus, in absence of these facts about the age of the victim, the judgment of trial Court is vitiated and deserves to be set-aside.

(10) On the strength of the said arguments learned counsel for the appellant prayed for allowing the appeal and holding the appellant to be innocent, acquit him of the charges levelled against him.

(11) Per contra learned Government Advocate appearing on behalf of the State vehemently opposed the appeal and submissions made by the learned counsel for the appellant. He submitted that the victim has been raped continuously for two years and the appellant had also administered pills to avoid pregnancy and had also threatened the victim for life. He further submitted that from the statements of PW/1 Saba Rehman it could be gathered that the prosecutrix was a suspected HIV patient and even PW/5 Dr. Asha Singh vide Ex. P/4 had opined for conducting her Histopathological Examination, which means “**to look for changes in cells that explain the actual cause of the patient's illness**”, which indicates that she was suspected of some sexually transmitted disease, which was caused due to she being subjected to sexual abuse by the appellant and as per the statements of PW/4 Prosecutrix herself, it was the appellant who was responsible for that. He further submitted that there is no illegality in the judgment and order passed by the trial court.

(12) On the sentence part it was submitted that since this is a heinous crime where a girl of 11 years of age had been sexually exploited number of times by the appellant, leniency by the Court in such case would send wrong message in the society, rather such type of cases deserve exemplary punishment, so that persons of deviant behavior may choose not to do so. Therefore, matter should be treated as rarest of rare and the sentence of life for his entire natural life as awarded by the Trial Court is proportionate to



the crime committed, therefore, the sentence awarded by the trial court needs no interference. He further submitted that the present appeal has no merits and it deserves to be dismissed.

(13) We have considered the rival submissions made by the learned counsel for the parties and perused the material on record.

### **DISCUSSION**

(14) The arguments of the learned counsel for the appellant that the entire proceedings in the present matter are vitiated as there is a total non-compliance of the provisions of section 273 Cr.P.C., regarding examination of prosecution witnesses in absence of appellant, which is de hors the said section, if found to be proved, since would go to the very root of the matter, is discussed herein first.

(15) Before adverting to the submissions as advanced in this behalf which borders around the provisions of section 273 Cr.P.C. first lets discuss the provision itself first, which reads as under:

**“273. Evidence to be taken in presence of accused.** Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.”

Other provisio relevant for consideration are section 299 and section 317 of Cr.P.C., which reads under:

**“299. Record of evidence in absence of accused.**

(1) If it is proved that an accused person

has absconded, and that there is no immediate prospect of arresting him, the Court competent to try, [or commit for trial] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

3. Provision for inquiries and trial being held in the absence of accused in certain cases.

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that

the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

(16) Section 273 opens with the expression “Except as otherwise expressly provided...” By its very nature, the exceptions to the application of Section 273 must be those which are expressly provided in the Code. Sections 299 and 317 are such express exceptions provided in the Code. In the circumstances mentioned in said Sections 299 and 317, the contents of which need no further elaboration, the Courts would be justified in recording evidence in the absence of the accused. Under its latter part, Section 273 also provides for a situation in which evidence could be recorded in the absence of the accused, when it says “when his personal attendance is dispensed with, in the presence of his pleader”. From the record it appears that there was neither

any willingness on the part of the appellant nor there was any order or direction by the trial Court that the evidence be recorded in the absence of the appellant. The matter, therefore, would not come within the scope of the latter part of Section 273 and it cannot be said that there was any dispensation as contemplated by the said Section. We will, therefore, proceed on the footing that there was no dispensation and yet the evidence was recorded without ensuring the presence of the accused.

(17) In the case at hand, from the record it is borne out from the record that prosecution examined its witnesses on 26/10/2016, 23/01/2017, 28/03/2017, 18/7/2017, 07/11/2017 and 05/10/2018, in the absence of the appellant, Saba Rehman (PW/1), Mamta Singh (PW/2), Dr. Asha Singh (PW/5), Vandana (PW/6), Narendra (PW/7), Dr. D.R. Sagar (PW/8), Lalji Tripathi (PW/10), R.P. Indoriya (PW/11) & Sanjay Singh (PW/12) and on these dates there is no order by the Trial Court substantiating with reasons as to why the statements of the witnesses were recorded in the absence of the accused? Apart from that the counsel appearing on behalf of the accused had also not stated that he was authorized by the appellant to cross-examine the said witnesses in the absence of the accused.

(18) Here, we may usefully quote the opinion recorded by S.B. Sinha, J., in the case of **Jayendra Vishnu Thakur vs State of Maharashtra reported in (2009) 7 SCC 104**, which reads as follows: -

“18. The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is a valuable right. ....

23. An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum. The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.

24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of

being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence viz-a-viz opinion. 8 (2009) 7 SCC 104 19 (See - Sarabjit Rick Singh v. Union of India, [ (2008) 2 SCC 417 ].

25. It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus, scrupulous compliance thereof is imperative in character. It is a well-known principle of interpretation of statute that any word defined in the statutory provision should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character.”

(19) In **State of M.P. Vs. Budhram, as reported in 1996 Cr.L.J. 46**, as has been cited by the counsel for the appellant, it has been held as follows:-

"5. It is a matter of grave concern that a man facing trial on charge of having committed seven murders and ultimately found guilty and sentenced to death has to wait for the outcome of his fate longer than

necessary but in the facts and circumstances of the case it cannot be helped. The infirmity pointed out above goes to the root of the matter and the case must be remanded back for re-trial. It is equally a matter of concern that in such important trials the accused person is not produced before the trial judge from jail on some pretext or the other. This clearly amounts to obstructing the course of justice and the constitutional process. The time has come when this Court is to take stock of the situation and try to evolve remedial measures. With this aim in view a copy of this judgment be placed before the Hon'ble the Chief Justice for being discussed in the next full court meeting.”

(20) Further reliance was placed by the counsel for the appellant in the matter of **Atma ram & others Vs. State of Rajasthan reported in (2019) 20 SCC 481** the Supreme Court, in which it had been held as under:

“25. We must also consider the matter from the stand point and perspective of the victims as suggested by the learned Amicus Curiae. Four persons of a family were done to death. It is certainly in the societal interest that the guilty must be punished and at the same time the procedural requirements which ensure fairness in trial must be adhered to. If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are

adequately safeguarded. The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected. On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order de novo examination of the concerned witnesses, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence.”

(21) Similar view had been expressed by Division Bench of this Court in the matter of State of Madhya Pradesh Vs. Ravi @ Toli Malviya passed in Cr.A.No.13/2019 on 30/01/2020, Gajendra Singh Vs. State of M.P. reported in 2020 (3) MPLJ (Criminal) 164. Thus, in the light of the factual matrix of the case and above pronouncements we have no hesitation to hold that Section 273



Cr.P.C. stood violated in the present matter and that there was an infringement of the salutary principle under Section 273 of Cr.P.C. (22) With regard to the argument of the learned counsel for the appellant that since there was no determination of the age of the victim as per Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007 and since there is no finding as regards to the victim being child as per section 2(d) of the POCSO Act, the entire prosecution story is vitiated, this Court though finds that there are no documents available on record, so as to precisely establish the age of the prosecutrix nor there is any medical report in the form of X-Ray or ossification test etc. coupled with no discussion by the Trial Court regarding it do not concur with arguments and finds them to be bit misplaced. It appears that trial Court got influenced by the physical appearance of the victim and as she would had appeared to be a minor. Apart from the above aspect the evidence adduced by the prosecution in the form of PW/3 Uma, maternal grandmother who in para 1 of her statement had stated that her daughter Neelam i.e. mother of the prosecutrix, got married to PW/7 Narendra, father of prosecutrix, in the year 2001 and even if the prosecutrix is said to born the very next year of the marriage i.e. 2002, looking to the date of lodging of the report i.e. 24/02/2016 and the period of incident i.e. 2 years prior to that, the age of prosecutrix comes in between 12-13 years. Further, PW/5 Dr. Asha Singh, while proving Ex. P/4 i.e. MLC in para 3 of her court statement had deposed while

examining the prosecutrix her pubic hair were not developed, not even one finger could be inserted in the vagina due to which it was difficult to take the swab sample, thus, it could at the most be said to an irregularity committed by the Trial Court and would not vitiate the entire proceedings, but now since a serious objection had been raised by the counsel for the appellant regarding age of the prosecutrix, we deem it appropriate to get the age of prosecutrix verified in accordance with the provisions of Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007.

(23) For these reasons the matter is remanded to the Special Judge, Protection of Children from Sexual Offences Act, 2012 Dabra, District Gwalior to cause examination, cross-examination and re-examination of the prosecution witnesses as mentioned in para 17 in the presence of accused and his counsel and then to record the statements of the accused under section 313 of Cr.P.C. We also deem it fit to direct the Trial Court to conduct an enquiry with regard to the age of prosecutrix in accordance with Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007.

(24) We direct the Trial Court to complete the proceedings within a period of six months from the date of receipt of the judgment. Let a copy of the judgment along with the record be transmitted forthwith to the Trial Court.

(25) We record our appreciation for Shri Sameer Kumar

Shrivastava, learned counsel appointed through Legal Aid, for his able assistance to this Court.

(26) Consequently, the appeal is disposed of finally in above terms.

(Rohit Arya)  
Judge  
27/10/2022

(Milind Ramesh Phadke)  
Judge  
27/10/2022

Pawar/-