

A DARGA RAM @ GUNGA  
v.  
STATE OF RAJASTHAN  
(Criminal Appeal No. 513 of 2008)

B JANUARY 8, 2015

[T.S. THAKUR AND R. BANUMATHI, JJ.]

*Penal Code, 1860 – ss.302 and 376 – Murder and rape of minor girl aged 7 years – Conviction by courts below – Held: The circumstances of the case form a complete chain and lead to an irresistible conclusion that the accused was responsible for rape and murder – Conviction affirmed.*

*Juvenile Justice (Care and Protection of Children) Act, 2000 – s.12(3)(b) – Conviction for rape and murder – In appeal to Supreme Court, plea of Juvenility – Constitution of Medical Board – The Board determined his age in the range of 30 to 36 years and took 33 years as his average age – In view of the opinion of the Medical Board, the accused was a juvenile as on the date of occurrence – Sentence of life imprisonment set aside.*

**Partly allowing the appeal, the Court**

**HELD: 1. The prosecution has clearly established that a “Jaagran” was arranged by the complainant on the offside of village near the well in which nearly 50 people participated including the deceased child. The deceased had gone out to sleep after dinner around mid night. The appellant was also participating in the “Jaagran” and was seen sitting along with some of the prosecution witnesses. Deceased was found missing in the morning but upon search her dead body was noticed at some distance in the village in a naked condition with injuries on her private parts and her head smashed with a stone**

lying nearby. The appellant made a disclosure statement leading to the recovery of his blood stained clothes. The blood was found to be of human origin and belonging to group 'A' which also was the blood group of the deceased. The appellant on medical examination was found to have several injuries on his body including injury on his penis. The injuries found on the person of the appellant were said to be 3 to 5 days old. The appellant did not offer any explanation for the injuries on his body. These circumstances form a complete chain and lead to an irresistible conclusion that the appellant was responsible for the offence of rape and murder of the deceased. The conviction of the appellant for offences under Section 302 and 376 of IPC is affirmed. [para 10-11 and 17] [357-A-H; 358-A; 362-G]

2. The appellant's age as per the Medical Board, has been placed in the range of 30 to 36 years. The Board appears to have taken the average of two extremitees and concluded that the appellant's age on the date of the examination was about 33 years. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the present case spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. However, in view of the fact that the age was determined by a Medical Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine, the court is going by the age estimate given by the Medical Board and declares the appellant to be a juvenile as on the date of the occurrence. Even if the age of the appellant was determined by the upper extremity limit i.e. 36 years the same would have been subject to variation of plus minus 2 years meaning thereby that he could as well be 34 years on the date of the examination. Taking his age as 34 years on the date of the examination, he would have been 18 years, 2 months and 7 days on the date of the occurrence,

A but such an estimate would be only an estimate and the  
appellant may be entitled to additional benefit of one year  
in terms of lowering his age by one year in terms of Rule  
12 (3)(b) which would then bring him to be 17 years and  
2 months old, therefore, a juvenile. The sentence awarded  
B to the accused shall stand set aside. [paras 13, 15, 16 and  
17] [360-A-D; 362-A-D; 361-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 513 of 2008.

C From the Judgment & Order dated 20.08.2007 of the High  
Court of Judicature for Rajasthan Bench at Jodhpur in D.B.  
Criminal Jail Appeal No. 604 of 2004.

Vijay Panjwani (A.C.) for the Appellant.

D Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

E T.S. THAKUR, J. 1. The appellant was tried and  
convicted for offences punishable under Sections 376 and 302  
IPC. For the offence of rape punishable under Section 376, he  
was sentenced to undergo imprisonment for a period of 10  
years besides a fine of Rs.1000/- and default sentence of one  
month with rigorous imprisonment. Similarly, for the offence of  
F murder punishable under Section 302 IPC, he was sentenced  
to undergo life imprisonment besides a fine of Rs.3,000/- and  
default sentence of three months' rigorous imprisonment. Both  
the sentences were directed to run concurrently. Criminal  
Appeal No.604 of 2004 filed by him was heard and dismissed  
G by a Division Bench of the High Court of Judicature for  
Rajasthan at Jodhpur. The present appeal assails the impugned  
judgment and order.

2. A first Information Report was registered at Police  
Station Rani in the State of Rajasthan on 11th April, 1998, *inter*  
H *alia*, stating that the complainant on 9th April, 1998 had

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organised a "Jaagran" (night long prayer meet) near a well belonging to one Magga Ram. The complainant and other relatives, in all around 50 persons assembled for the "Jaagran" that continued till late night. This included his seven year old daughter-Kamala who went to sleep along with other children close to the place where the "Jaagran" was held. When he returned to his house he noticed that Kamala was missing. Assuming that she may have gone away with one of the relatives, a search was made at their houses but Kamala remained untraceable. The search was then extended to neighbouring areas where the dead body of Kamala was discovered by Magga Ram (PW-5) and Pura Ram. On receipt of this information he and Naina Ram (PW-2) went to the place and found that baby Kamala had been raped and killed by crushing her head with a stone. The dead body of Kamala was, according to the report, lying on the spot.

3. A case under Sections 302 and 376 of the IPC was registered on the basis of the above information and investigation started which led to the arrest of the appellant and eventually a charge sheet against him before the jurisdictional magistrate who committed the case to Additional Sessions Judge, (Fast Track), Bali.

4. Before the Sessions Court, the appellant pleaded not guilty and claimed a trial. At the trial the prosecution produced 19 witnesses apart from placing reliance upon several documents. No evidence in defence was, however, led by the appellant. By its judgment and order dated 27th January, 2004 the trial Court eventually held the appellant guilty and accordingly convicted and sentenced him as indicated above. Aggrieved by the judgment and order passed by the trial Court, the appellant preferred Criminal Appeal No.604 of 2004 which was, upon reappraisal of the evidence adduced before the trial Court, dismissed by the High Court affirming the conviction recorded against the appellant and the sentence awarded to him for both the offences.

A 5. We have heard learned counsel for the parties at  
considerable length. Prosecution case is based entirely on  
circumstantial evidence as no ocular account of the incident has  
been presented to the Court. Both the Courts below have,  
however, found the circumstantial evidence adduced by the  
B prosecution to be sufficient to record a finding of guilt against  
the appellant for the offences with which he was charged. We  
may briefly refer to the circumstance as also the evidence  
supporting the same.

C 6. The first and foremost is the deposition of Ota Ram  
(PW-4) which clearly establishes that the appellant was also  
one of those who had participated in the "Jaagran" along with  
other villagers. To the same effect is the statement of Maga  
Ram (PW-5) who too had testified that the appellant was  
D present in the "Jaagran". He had seen Kamala at around 10.00  
in the night. The deposition of both these witnesses proves that  
apart from the appellant and several others, baby Kamala the  
deceased was also present at the "Jaagran" with other children  
and had gone off to sleep after taking dinner. That version is  
E supported even by Naina (PW-1), who states that the appellant  
was also present in the "Jaagran" around mid night when the  
tea was served to those present including the appellant. The  
witness has further deposed that his son and daughter Kamala  
were sleeping around the place but Kamala was found missing  
F in the morning. There is, in our opinion, no reason to disbelieve  
the version of these witnesses when they say that the "Jaagran"  
was held by the complainant in which Kamala his daughter was  
present and gone off to sleep nor is there any reason to  
disbelieve the story that even the appellant was present at the  
"Jaagran" and had tea with other witnesses around mid night.

G 7. That Kamala died a homicidal death was not seriously  
disputed either before the Courts below or before us and rightly  
so because the statement of doctor Omprakash Kuldeep (PW-  
18) who conducted the post-mortem and authored the report  
marked as Ex. P-34 has clearly opined that Kamala died a  
H homicidal death on account of injury on her head. In the

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deposition, the doctor certified injuries even on her private parts. A  
The post-mortem report certifies the following injuries on the  
person of the deceased:

1. Face crushed.
2. Upper lip was cut. Bleeding was from right ear, B  
dried seminal stains on right and left thigh.
3. Nose bone was depressed and fractured.
4. Fracture was on left orbital margin.
5. Fracture was in left temporal bone. C
6. Fracture was in maxilla bone of left side.
7. Fracture in parietal bone and occipital bone of right  
side which was upto the base of skull.
8. Incise teeth of lower and upper (jaw) were broken. D
9. Achaimosis was present in Genital organs labia.
10. Crushing wound was on forechete and perineum.
11. Hymn was congested."

8. Rajendra Singh (PW-9), who investigated the case and E  
who is a witness to the scene of occurrence, seized blood  
stained clothes of the deceased including two hairs recovered  
from the private parts of the deceased. He is also witness to  
the seizure of blood stained clothes of the appellant on the basis  
of a disclosure statement made by him. Equally important is the F  
circumstance that the FSL report found the trouser and the shirt  
of the appellant to be stained with human blood belonging to  
group 'A' which happened to be the blood group of the  
deceased also. The stone used for crushing the head of the  
deceased was also found to be smeared with human blood of G  
group 'A'.

9. What supports the prosecution case in a great measure  
is also the fact that the appellant had suffered multiple injuries  
on his private parts. The medical examination report dated 13th  
April, 1998 marked as Ex. P-38 has noticed the following  
injuries on the person of the appellant: H

A	(i)	Abrasion	1x0.5 cm. Size	Dorsal Aspect of (Rt) Elbow joint.
	(ii)	Abrasion	3x2 cm. Size	Medical Aspect of (Lt) Elbow joint.
B	(iii)	Multiple Abrasion	Varying in Size	Dorsal Aspect of (Lt) Elbow joint.
	(iv)	Abrasion	7.5x1 cm. Size	Ant. aspect of (Rt.) leg Just below (Rt.) knee joint
C	(v)	Abrasion	1.5x1 cm.	Ant. aspect of (Lt.) knee joint
	(vi)	Abrasion	1x0.5 cm.	Medial side of Ant. Aspect (Lt.) knee joint
D	(vii)	Abrasion	1x1 cm.	Lt. side of Ant. Aspect of (Lt.) knee joint
	(viii)	Abrasion	1x0.5 cm.	Dorsal Aspect of Retracted Prepuce.
E	(ix)	Abrasion	2x0.25 cm.	Lat. Aspect of (Rt.) side of Retracted prepuce.
F	(x)	Abrasion	0.25x0.25 cm.	Dorsal Aspect of glans penis
	(xi)	Abrasion	2x0.25 cm.	Lat. Aspect of (Rt.) Thigh
	(xii)	Abrasion	2x0.25 cm.	(Rt.) gluteal Region
G	(xiii)	Abrasion	2x1 cm.	(Lt.) Palm

Duration of all injuries i.e. S.No. i to xiii is 3-5 days. "

10. No explanation was, however, offered by the appellant for the injuries sustained by him one of which was found even

H

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at his penis. To summarise, the prosecution has clearly established: A

(1) That a "Jaagran" was arranged by the complainant on the offside of village near the well in which nearly 50 people participated including Kamala the deceased child. B

(2) The deceased-Kamala had gone out to sleep after dinner around mid night.

(3) The appellant was also participating in the "Jaagran" and was seen sitting along with some of the prosecution witnesses. C

(4) Kamala-deceased was found missing in the morning but upon search her dead body was noticed at some distance in the village in a naked condition with injuries on her private parts and her head smashed with a stone lying nearby. D

(5) The appellant made a disclosure statement leading to the recovery of his blood stained clothes. E

(6) The blood was found to be of human origin and belonging to group 'A" which also was the blood group of the deceased-Kamala. E

(7) The appellant on medical examination was found to have several injuries on his body including injury on his penis. F

(8) The injuries found on the person of the appellant were said to be 3 to 5 days old.

(9) The appellant did not offer any explanation for the injuries on his body. G

11. The above circumstances, in our opinion, form a complete chain and lead to an irresistible conclusion that the appellant was responsible for the offence of rape and murder H

A of the hapless baby-Kamala who appears to have been picked  
 up from the place where she was sleeping with other children  
 and taken at a distance only to be raped and eventually killed.  
 The trial Court, in the light of the evidence on record and careful  
 analysis undertaken by it, correctly came to the conclusion that  
 B the appellant was guilty of murder of the deceased. There is  
 no reason whatsoever for us to interfere with that finding.

12. What remains to be addressed now is an application  
 filed by the appellant in this Court seeking to raise a plea that  
 C the appellant was a juvenile on the date of the commission of  
 offence hence entitled to the benefit of Juvenile Justice (Care  
 and Protection of Children) Act, 2000. Since the appellant did  
 not have any documentary evidence like a school or other  
 certificate referred to under the Act mentioned above, this Court  
 had directed the Principal, Government Medical College,  
 D Jodhpur, to constitute a Board of Doctors for medical  
 examination including radiological examination of the appellant  
 to determine the age of the appellant as in April, 1998 when  
 the offence in question was committed. The Superintendent of  
 the Central Jail was directed to ensure production of the  
 E appellant for the purpose of determination of his age before the  
 Medical Board for carrying out the tests and examination. In  
 compliance with the said direction, the Principal constituted a  
 Medical Board for determining the age of the appellant and  
 submitted a report dated 4th February, 2014. The report records  
 F the following findings and conclusions:

“Age estimation of Darga ram @ Gunga s/o Heera on the  
 basis of findings of X Ray of Elbow, Wrist, Pelvis, Sternum,  
 Medial end of Clavicle, Skull and left shoulder joint (film  
 G no.10252 dated 04-02-2014, Eight Film and CT Scan of Skull  
 and Mandible (film 56013, four films) dated 04-02-2014, is as  
 below:-

1. All Epiphysis around elbow joint, lower end of  
 Radius & Ulna, Iliac Crest & Ischial tuberosity & for  
 H medial end of Clavicle have appeared 7 fused, it

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suggests that his age is above 22 years. A

2. All the body pieces of sternum have fused with each other but not fused with Xiphoid process & manubrium sternum, it suggests his age is above 25 years but below 40 years. B

3. Posterior 1/3 of sagittal suture have fused, it suggests his age is above 30 years & below 40 years.

4. Ventral 7 Dorsal margins of pubic symphysis are completely defined & there are no granular appearance on it, it suggests his age is below 36 years. C

**Opinion:-**

Concluding all the above radiological findings, dental & Clinical appearance, the age of Darga Ram @ Gunga S/o Heera is in between 30 years to 36 years and the average age of Darga Ram @ Gunga S/o Heera is about 33 years on the date of examination. D  
E

Enclosure:- X Ray (8 plates) & CT Scan 4 Plates) as above.

Sd/-	Sd/-	Sd/-	F
(Dr. L. Raichandani)	(Dr. A.L.Chauhan)	(Dr. P.C. Vyas)	

Professor, Anatomy	PHOD, Radiodiagnosis	PHOD, forensic Medicine	G
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Dr. S.N. Medical College	Dr. S.N. Medical College	Dr. S.N. Medical College	
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Jodhpur	Jodhpur	Jodhpur"	H
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A 13. It is evident from the opinion tendered by the Board  
that the appellant's age has been placed in the range of 30 to  
36 years. The Board appears to have taken the average of two  
B extremitées and concluded that the appellant's age on the date  
of the examination was about 33 years. It was on the basis of  
this estimate that Mr. Panjwani contended that the appellant  
should have been around 14 years, 2 months and 7 days old if  
his age was 30 years on the date of medical examination. He  
should have been 17 years, 2 months and 7 days old on the  
C date of the occurrence if his age is taken as 33 years and 20  
years, 2 months and 7 days if his age is taken as 36 years on  
the date of the medical examination. It was argued that even if  
one were to accept the average of the two estimates in the  
range of 30-36 years, mentioned by the Medical Board, he was  
a juvenile on the date of the occurrence being only 17 years, 2  
D months hence entitled to the benefit of the provisions of the  
Juvenile Justice (Care and Protection of Children) Act, 2000.

14. The appellant is reported to be a deaf and dumb. He  
was never admitted to any school. There is, therefore, no  
officially maintained record regarding his date of birth.  
E Determination of his age on the date of the commission of the  
offence is, therefore, possible only by reference to the medical  
opinion obtained from the duly constituted Medical Board in  
terms of Rule 12(3) (b) of the Juvenile Justice (Care and  
Protection of Children) Rules, 2007. Rule 12(3)(b) reads as  
under:

**"12. Procedure to be followed in determination of  
Age.?"**

G (1) xxxxxxxxxxxxxxxx

(2) xxxxxxxxxxxxxxxx

(3)

H (b) and only in the absence of either (i), (ii) or (iii) of  
clause (a) above, the medical opinion will be sought from

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*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.*

*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 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”*

15. The medical opinion given by the duly constituted Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine has determined his age to be “about” 33 years on the date of the examination. The Board has not been able to give the exact age of the appellant on medical examination no matter advances made in that field. That being so in terms of Rule 12 (3) (b) the appellant may even be entitled to benefit of fixing his age on the lower side within a margin of one year in case the Court considers it necessary to do so in the facts and circumstances of the case. The need for any such statutory concession may not however arise because even if the estimated age as determined by the Medical Board is taken as the correct/true age of the appellant he was just about 17 years and 2 months old on the date of the occurrence and thus a juvenile within the meaning of that expression as used in the Act aforementioned. Having said that we cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand

A spread over a period of six years and taken a mean to fix the  
 age of the appellant at 33 years. We are not sure whether that  
 is the correct way of estimating the age of the appellant. What  
 reassures us about the estimate of age is the fact that the same  
 is determined by a Medical Board comprising Professors of  
 B Anatomy, Radiodiagnosis and Forensic Medicine whose  
 opinion must get the respect it deserves. That apart even if the  
 age of the appellant was determined by the upper extremity limit  
 i.e. 36 years the same would have been subject to variation of  
 plus minus 2 years meaning thereby that he could as well be  
 C 34 years on the date of the examination. Taking his age as 34  
 years on the date of the examination he would have been 18  
 years, 2 months and 7 days on the date of the occurrence but  
 such an estimate would be only an estimate and the appellant  
 may be entitled to additional benefit of one year in terms of  
 D lowering his age by one year in terms of Rule 12 (3)(b) (supra)  
 which would then bring him to be 17 years and 2 months old,  
 therefore, a juvenile.

16. In the totality of the circumstances, we have persuaded  
 ourselves to go by the age estimate given by the Medical Board  
 E and to declare the appellant to be a juvenile as on the date of  
 the occurrence no matter the offence committed by him is  
 heinous and but for the protection available to him under the  
 Act the appellant may have deserved the severest punishment  
 permissible under law. The fact that the appellant has been in  
 F jail for nearly 14 years is the only cold comfort for us to let out  
 of jail one who has been found guilty of rape and murder of an  
 innocent young child.

17. In the result, this appeal succeeds but only in part and  
 to the extent that while the conviction of the appellant for  
 G offences under Section 302 and 376 of IPC is affirmed the  
 sentence awarded to him shall stand set aside with a direction  
 that the appellant shall be set free from prison unless required  
 in connection with any other case.