A JARNAIL SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 1209 of 2010)

JULY 1, 2013

B

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860 – ss. 366, 376(g) & 120-B – Allegation that prosecurtix was forcefully taken away, and subjected to C *rape by the appellant and his three accomplices – Conviction of appellant – Justification – Held: Justified, in view of the statement of the prosecutrix u/s.164 CrPC, as also, the statement made by her before the trial court, and the manner in which she was subjected to cross-examination –* D *Substantial material corroborating the statement of the prosecutrix for unequivocal determination of the guilt of the appellant – Prosecutrix was recovered from the custody of appellant and thereafter, subjected to medico-legal examination by PW1 – PW1, in her independent testimony,* E *affirmed that she had been subjected to sexual intercourse, inasmuch as her hymen was found ruptured – Deposition of prosecutrix scientifically substantiated by report of FSL and of the Serologist – Defence plea that prosecutrix had accompanied the appellant, and had sexual intercourse with* F *him consensually completely ruled out, because as per the substantiated prosecution version, prosecutrix was not taken away by the appellant alone, but also, by his three accomplices – All four of them had similarly violated her person – PW8, the father of the prosecutrix, also in material* G *particulars corroborated the testimony of the prosecutrix – Further, the prosecutrix was a minor on the date of occurrence – Even if she had accompanied the appellant of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.*

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Juvenile Justice (Care and Protection of Children) Rules, 2007 – r.12 – Rape – Age of prosecutrix – Determination – Held: It would be just and appropriate to apply r.12 to determine the age of the prosecutrix – Even though r.12 is strictly applicable only to determine the age of a child in conflict with law, it should be the basis for determining age, even for a child who is a victim of crime – The manner of determining age conclusively, has been expressed in sub-rule (3) of r.12 – Age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in r.12(3) – Matriculation (or equivalent) certificate of the concerned child, is the highest rated option – Only in absence of the said certificate, r.12(3), envisages consideration of the date of birth entered in the school first attended by the child – In absence of such entry, r.12(3) postulates reliance on birth certificate issued by a corporation or a municipal authority or a panchayat – In absence of any of the aforesaid, r.12(3) postulates determination of age of the concerned child, on the basis of medical opinion – Juvenile Justice (Care and Protection of Children) Act, 2000 – s.68(1) – Penal Code, 1860 – s.376(g).

The prosecution case was that when the prosecutrix had gone out of her house to urinate in the street, the appellant and his three accomplices kidnapped her and thereafter they committed rape on her, one after the other. The trial court convicted the appellant under Sections 366, 376(g) and 120-B IPC. The conviction was upheld by the High Court.

In the instant appeal, it was contended by the appellant that the prosecutrix had voluntarily and with her free consent, accompanied the appellant and had sexual intercourse with him consensually; and in support of this contention the appellant pointed out that the prosecutrix had taken Rs.3,000/- from her father's house to make good her escape in the company of the appellant. The

A appellant also contested the determination of the High Court in the impugned judgment, wherein it had concluded, that the prosecutrix was a minor.

Dismissing the appeal, the Court

B HELD: 1.1. In her statement before the Trial Court, where she appeared as PW6, the prosecutrix had reiterated clearly the position of having been taken away by the appellant, and his three accomplices. She affirmed, that she was taken away in a tanker to Uttar Pradesh and C then all the accused had committed rape on her in a small room. On the aforestated aspect of the matter, she was not subjected to cross-examination at the behest of the accused. Only a suggestion was put to her, that she had persuaded the appellant to take her away, in order to D perform marriage with her, and for the said purpose had taken away cash, clothes and jewellery from her own residence. The aforestated suggestion was denied by the prosecutrix. Keeping in view the statement of the prosecutrix under Section 164 CrPC before the Judicial E Magistrate, First Class, as also, the statement made by her while appearing before the trial court, and the manner in which she was subjected to cross-examination, there is no room for any doubt, that the prosecutrix was forcefully taken away, and that, she was subjected to F rape at the hands of the appellant and his three accomplices. It may still have been understandable, if the case had been, that she had consensual sex with the appellant alone. But consensual sex with four boys at the same time, is just not comprehensible. [Para 15] [1060-G E-H; 1061-A-B]

1.2. In regard to the contention advanced by the appellant, that while leaving her house on 25.3.1993, the prosecutrix had taken away a sum of Rs.3,000/-, whilst it is true that in the complaint, PW8, the father of the H prosecutrix had categorically mentioned that a sum of

Rs.3,000/- was missing from his residence, and the said fact was duly mentioned in his complaint to the police dated 27.3.1993, yet he had not accused the prosecutrix for having taken it away. The instant aspect pales into insignificance, on account of the statement made by PW8 before the Trial Court that though he had mentioned that a sum of Rs.3,000/- was missing from his residence, but his wife had found the aforesaid money from the residence itself, a few days later. Accordingly, the assertion made by the appellant to the effect that the prosecutrix had taken away a sum of Rs.3,000/-, when she left the house of her father on 25.3.1993, cannot be stated to have been duly proved. Besides, it is apparent from the cross-examination of the prosecutrix, that a suggestion was put to her that besides cash, she had taken away clothes and jewellery at the time of leaving her father's house on 25.3.1993. The prosecutrix expressly denied the suggestion. There is no material on the record of the case to substantiate the said allegation. Therefore, it is not possible to accept the accusation levelled by the appellant against the prosecutrix, either on the issue of having taken away a sum of Rs.3,000/- while leaving her house, or that she left her house on 25.3.1993 along with clothes and jewellery. Accordingly, the inference drawn by assuming the said factual position as true, simply does not arise. [Para 16] [1061-D-H; 1062-A-C]

2.1. Further, the prosecutrix was a minor on the date of occurrence. Even if she had accompanied the appellant of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor. On the issue of determination of age of a minor, it would be just and appropriate to apply Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (framed under Section 68(1) of the Juvenile Justice (Care and Protection

A of Children) Act, 2000), to determine the age of the prosecutrix. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. B For, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12. Under the aforesaid provision, the C age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a D subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the E said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied F upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for G determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion. [Paras H 20, 21] [1063-E; 1065-E-H; 1066-A-E; 1067-D-E]

2.2. In the instant case, following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied upto class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix, on the next available basis, in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced PW4, to prove the age of the prosecutrix. PW4 was the Head Master of the Government High School where the prosecutrix had studied upto class 3. PW4 had proved the certificate Exhibit-PG, as having been made on the basis of the school records indicating, that the prosecutrix, was born on 15.5.1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. Therefore, the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix. Further, under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix. The deposition of PW4 has not been contested. Therefore, the date of birth of the prosecutrix (indicated in Exhibit P.G., as 15.7.1977) assumes finality. Accordingly it is clear, that the prosecutrix, was less than 15 years old on the date of occurrence, i.e., on 25.3.1993. [Para 21] [1066-E-H; 1067-A-D]

3. The prosecution version is not entirely based on the statement of the prosecutrix. After she was found missing from her father's residence on 25.3.1993, and after her father PW8 had made a complaint to the police on

A 27.3.1993, she was recovered from the custody of the appellant. Thereafter, the prosecutrix was subjected to medico-legal examination by PW1 on 29.3.1993 itself at 3.00 p.m. PW1, in her independent testimony, affirmed that she had been subjected to sexual intercourse, inasmuch B as her hymen was found ruptured. Even though the visual examination of the prosecutrix, during the course of her medico-legal examination did not reveal the presence of semen or blood, yet the report of the forensic science laboratory (Exhibit PL) and of the Serologist (Exhibit PL/ C 1) clearly establish the presence of semen on her salwar, underwear and pubic hair. The serologist's report also disclose, medium and small blood stains on her "salwar". In her own deposition, she had mentioned that, when she was raped by the appellant and his accomplices, bleeding D had taken place and she had felt pain, and her clothes were stained with blood. Her deposition stands scientifically substantiated by Exhibits PL and PL/1. The suggestion put to the prosecutrix at the behest of the appellant, during the course of her cross-examination, that she had accompanied the appellant, of her own free will E and had had sexual intercourse with him consensually, leaves no room for any doubt, that she was in his company, and that, he had had sexual intercourse with her. The assertion that the prosecutrix had accompanied the appellant, and had had sexual intercourse with him F consensually is completely ruled out, because as per the substantiated prosecution version, the prosecutrix was not taken away by the appellant alone, but also, by his three accomplices. All the four of them had similarly violated her person. Additionally, in her statement under G Section 164 of the Code of Criminal procedure, the prosecutrix had asserted, that in the first instance, after having caught hold of her, the accused had made her inhale something from a cloth which had made her unconscious. Thereafter, when the appellant attempted H to commit intercourse with her, she had slapped him. He

had then put a cloth in her mouth, to stop her from raising an alarm. Thereafter, each one of the accomplices had committed forcible intercourse with her in turns. The factum of commission of forcible intercourse by the appellant, as also, his accomplices was reiterated by her during her testimony before the Trial Court as PW6. Besides the aforesaid, there is a statement of her own father PW8 who also in material particulars had corroborated the testimony of the prosecutrix. The prosecutrix was not subjected to cross-examination on any of these issues. Nor was the prosecutrix confronted with either the statements made by her under Section 161 or Section 164 of the Code of Criminal Procedure, so as to enable her to explain discrepancies, if any. Therefore, there was substantial material corroborating the statement of the prosecutrix for an unequivocal determination of the guilt of the appellant. [Para 24] [1068-C, D-H; 1069-A-H; 1070-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1209 of 2010.

From the Judgment and Order dated 04.11.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 247-SB of 1995.

H.P.S. Ishar, Dr. Kailash Chand for the Appellant.

Meera Bhatia, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The factual position on which the prosecution version is founded, commences with the passing of information by Savitri Devi (the mother of the prosecutrix VW - PW6), to her husband Jagdish Chander-PW8, on 26.3.1993, at about 6 am. She informed her husband, that the prosecutrix VW - PW6 was missing from their residence. In this behalf it would be pertinent to mention, that on 25.3.1993

A at about 10 pm; Jagdish Chander went to sleep in the "baithak" (drawing room) of their residence. Savitri Devi, the mother of the prosecutrix VW - PW6, along with the prosecutrix VW - PW6, and the other children (comprising of three sons, the prosecutrix VW – PW6 and one other daughter), went to sleep B in the other rooms of the house. Savitri Devi, told her husband, that she suspected the accused-appellant Jarnail Singh, may be responsible for having taken away their daughter.

2. Jagdish Chander-PW8, commenced to search for his daughter. During the course of the aforesaid search, the C accused-appellant Jarnail Singh, who had his residence in the neighbourhood (of Jagdish Chander-PW8), was also found missing from his residence. The search for the prosecutrix VW - PW6 by her father, proved futile. It is therefore, that Jagdish Chander-PW8, made a complaint Exhibit PO on 27.3.1993 to D the Sub-Inspector Incharge, Police Post, Jathlana. In his complaint, he described VW - PW6, as the elder of his two daughters. He gave out her age as about 16 years. He also alleged, that his daughter VW - PW6 had gone missing from their residence in the night intervening 25th and 26th March, E 1993. He also alleged, that an amount of Rs.3,000/- was missing from his house, which he assumed may have been taken away by his daughter VW - PW6, while leaving the house. In the complaint Exhibit PO, the needle of suspicion was pointed at the accused-appellant Jarnail Singh.

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3. After the registration of the complaint of Jagdish Chander-PW8, the prosecutrix VW - PW6 was recovered on 29.3.1983, from the custody of the accused-appellant Jarnail Singh, from the house of Shashi Bhan at Raipur in district G Haridwar. The accused-appellant simultaneously came to be arrested, on 29.3.1993.

4. The statement of the prosecutrix VW - PW6 was got recorded under Section 164 of the Code of Criminal Procedure before O.P. Verma, Judicial Magistrate First Class, Jagadhri H on 6.4.1993. It is necessary in the facts and circumstances of

this case to extract herein her short statement recorded under Section 164 of the Code of Criminal Procedure, which is being reproduced hereunder:

> "Stated that on the night of 25.3.1993 at around 11 pm, I went to a street near my house to answer nature's call. Accused Jarnail Singh and his three accomplices were hiding there. When I got up after answering nature's call, then they caught hold of me and inhaled me something by cloth, due to which, I got unconscious. They took me to some unknown place in U.P. by putting me in some vehicle. There they took me to a room.
>
> Jarnail Singh, forcibly committed wrong (intercourse) with me. I slapped on his face, then he put cloth in my mouth. Therefore, I could not raise noise. Thereafter, everyone committed forcible intercourse with me, turn by turn. Huge blood came out of my vagina, and I felt a lot of pain. Thereafter, police caught us and handed over me to my parents."

5. On completion of investigation, a challan was presented under Sections 366, 376 and 120 of the Indian Penal Code. The matter was committed to the Court of Sessions, Jagadhri, whereupon, it was marked to the Additional Sessions Judge, Jagadhri. The Additional Sessions Judge, Jagadhri framed charges on 20.12.1993. The accused-appellant pleaded not guilty, and claimed trial.

6. In order to bring home the charges levelled against the accused-appellant, the prosecution examined 9 witnesses. Thereafter, the prosecution evidence was closed. The statement of the accused-appellant Jarnail Singh, was then recorded under Section 313 of the Code of Criminal Procedure. He denied the allegations levelled against him, and pleaded false implication. Despite opportunity having been afforded to him, the accused-appellant did not lead any evidence, in his defence.

A 7. It is necessary to record, that on the culmination of the trial, the Additional Sessions Judge, Jagadhri arrived at the conclusion, that the prosecution had been able to bring home the guilt of the accused-appellant beyond any shadow of reasonable doubt, under Sections 366, 376(g) and 120-B of B the Indian Penal Code. The accused-appellant Jarnail Singh was accordingly held guilty of the charges levelled against him. The Additional Sessions Judge, Jagadhri gave an opportunity of hearing to the accused-appellant Jarnail Singh on the question of sentence. Thereupon, for the offence under Section C 376(g) of the Indian Penal Code the accused-appellant was awarded rigorous imprisonment for 10 years, he was also required to pay a fine of Rs.200/- (in case of default in payment of fine, the accused-appellant was to undergo further rigorous imprisonment for 3 months). For the offence under Section 366 D of the Indian Penal Code, the accused-appellant was awarded rigorous imprisonment for 7 years, and was required to pay a fine of Rs.150/- (in case of default in payment of fine, the accused-appellant was to undergo further rigorous imprisonment for 3 months). And for the offence under Section 120-B of the Indian Penal Code, the accused-appellant was E awarded rigorous imprisonment for 7 years, and was required to pay a fine of Rs.150/- (in case of default in payment of fine, the accused-appellant was to undergo further rigorous imprisonment for 3 months). The aforesaid sentences were ordered to run concurrently.

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8. Dissatisfied with the judgment dated 14.3.1995, rendered by the trial Court, the accused-appellant Jarnail Singh preferred Criminal Appeal no. 247-SB of 1995 before the Punjab & Haryana High Court at Chandigarh (hereinafter G referred to as, the High Court). The High Court dismissed the appeal preferred by the accused-appellant on 4.11.2008. The judgment of conviction dated 14.3.1995 and the order of sentence dated 15.3.1995 (rendered by the trial Court i.e., the Additional Sessions Judge, Jagadhri) were upheld.

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9. Dissatisfied with the judgment of the trial Court dated 14.3.1995 and that of the appellate Court dated 4.11.2008, the accused-appellant Jarnail Singh approached this Court. On 7.7.2010, this Court granted leave, in the Petition for Special Leave to Appeal (Crl.) no. 7836 of 2009, filed by the accused-appellant. Having traversed the aforesaid course, the instant criminal appeal has finally been placed before us, for adjudication.

10. Before dealing with the issues canvassed at the hands of the learned counsel for the accused-appellant Jarnail Singh, it is considered expedient to have a bird's eye view of the relevant prosecution witnesses. It is, therefore, that we shall endeavour to deal with the testimony of some of the prosecution witnesses hereunder:

(i) Dr. Kanta Dhankar was produced by the prosecution as PW1. She had medico-legally examined the prosecutrix VW - PW6 on 29.3.1993 at 3 pm. According to her testimony, no blood or seminal stain was visible to the naked eye, during the course of examination of the prosecutrix VW - PW6. Pubic hairs were present. There was no visible injury on the external genitalia or vagina. The hymen of the prosecutrix VW - PW6 was found ruptured. Her vagina admitted 2/3 fingers easily. The clothes of the prosecutrix VW - PW6, a swab taken from her vagina and her pubic hair, were sent to the forensic science laboratory for examination, so as to determine whether there was any semen or blood thereon. Along with the testimony of Dr. Kanta Dhankar- PW1, it is necessary to record, that as per the report of the forensic science laboratory (Exhibit PL), human semen was detected on the prosecutrix's "salwar" (female trouser), her underwear, as also, on her pubic hair. The report of the serologist (Exhibit PL/1) further revealed

A medium and small sized blood stains on the "salwar". The report of the serologist also disclosed, that the stains on the "salwar" were of human blood.

(ii) Dr. Satnam Singh-PW2, was the second witness to be examined by the prosecution. He had medico-legally examined the accused-appellant Jarnail Singh. Dr. Satnam Singh-PW2, while deposing before the trial Court affirmed, that the accused-appellant was capable of sexual intercourse.

(iii) The prosecution then examined Moti Ram as PW3. Moti Ram testified, that he was present when the prosecutrix VW - PW6, was recovered whilst in custody of the accused-appellant, from the house of Shashi Bhan at Raipur, in district Haridwar. Moti Ram also affirmed the presence of Om Prakash, Jagmal and Sumer Chand, along with the police party, at the time of recovery of the prosecutrix VW - PW6, on 29.3.1993. Moti Ram had identified the prosecutrix VW - PW6, at the time of her said recovery.

(iv) Satpal was produced by the prosecution as its fourth witness. Satpal-PW4 was the Headmaster of the Government High School, Jathlana, i.e. the school which the prosecutrix VW - PW6, had first attended. Satpal-PW4 proved the certificate Exhibit PG, as having been prepared on the basis of the school records. As per the certificate, Exhibit P4, the prosecutrix VW - PW6 was born on 15.5.1977.

(v) The prosecutrix appeared as PW6 before the trial Court. She affirmed the factual position expressed by her father Jagdish Chander-PW8 in his complaint dated 27.3.1993 (Exhibit PO). She also reiterated the factual position expressed by her, in

her statement, recorded under Section 164 of the Code of Criminal Procedure, on 6.4.1993. In sum and substance she asserted, that she had studied upto class 3 at the Government High School, Jathlana, whereafter, she started to do household work at home. On 25.3.1993 at about 11 pm, she had gone out of her house to urinate in the street. The accused-appellant Jarnail Singh and three other persons had caught hold of her, and had taken her in a tanker towards Raipur side in Uttar Pradesh. The accused-appellant Jarnail Singh and his three accomplices, had then raped her in a small room. She also testified, that she had been recovered by the police from Raipur, and at the time of her recovery, Moti Ram-PW3 and her uncle Omilal (Om Prakash) and Jagmal were present with the police party. Thereafter, she claims to have been brought to police post Jathlana, and was got medico-legally examined by a lady doctor at Civil Hospital, Radaur. Since the prosecutrix VW - PW6, was not disclosing the entire factual position, and seemed to be changing the version of her statement recorded under Section 164 of the Code of Criminal Procedure, the Public Prosecutor sought permission to cross-examine her. Consequent upon being permitted to cross-examine the prosecutrix VW - PW6, she affirmed, that the accused-appellant had been alluring her for marriage, with the promise of giving her ornaments and clothes, and a further commitment to move her to the city, after their marriage. During these allurements, the accused-appellant Jarnail Singh used to also impress upon her, that her parents were poor and would marry her to some poor person, who would never be able to provide her such facilities. During her cross-examination, she expressly denied the suggestion, that she herself

A had allured the accused-appellant Jarnail Singh, to take her away, in order to marry him.

(vi) O.P. Verma, Judicial Magistrate First Class, Jagadhri, appeared as PW7. He proved the statement, recorded before him under Section 164 B of the Code of Criminal Procedure, by the prosecutrix VW - PW6, on 6.4.1993.

(vii) Jagdish Chander-PW8, the father of the prosecutrix VW - PW6 during the course of his deposition, C affirmed the factual position depicted in his complaint dated 27.3.1993 (Exhibit PO). He also corroborated the testimony of his daughter (i.e., the prosecutrix VW - PW6) in all material particulars.

D The conviction of the accused-appellant at the hands of the trial Court (on 14.3.1995) and by the High Court (on 4.11.2008) was primarily based on the statements of the prosecution witnesses summarised above.

11. We shall now endeavour to deal with the submissions E advanced at the hands of the learned counsel for the accused-appellant.

12. The first and foremost contention advanced at the hands of the learned counsel for the accused-appellant was, F that the prosecutrix VW - PW6, had voluntarily and with her free consent, accompanied the accused-appellant Jarnail Singh. It was contended, that in actuality, it was the prosecutrix VW - PW6 who had allured the accused-appellant to marry her, and had persuaded him to take her away during the night intervening G 25th and 26th March, 1993. In order to substantiate the instant submission, it was pointed out that the prosecutrix VW - PW6 has remained with the accused Jarnail Singh for four days without any protestation. During the course of the aforesaid four days in the company of the accused-appellant Jarnail Singh, they had travelled from one place to another, and had finally H

reached the house of Shashi Bhan at Raipur (from where the police recovered her on 29.3.1993). It was submitted, that there was ample opportunity with her, to raise an alarm during the aforestated four days. The fact that she did not raise any alarm shows, that she had voluntarily remained with the accused-appellant Jarnail Singh. Therefore, sexual intercourse with the accused-appellant Jarnail Singh, according to learned counsel, was also consensual. Thus viewed, it was asserted, that the accused-appellant Jarnail Singh could not be accused of either having kidnapped her, and/or having committed rape on her.

13. On the same issue, learned counsel for the accused-appellant also invited our attention to the fact, that in the complaint lodged by Jagdish Chandra (PW8), dated 27.3.1993, he had expressly mentioned that the prosecutrix had taken away a sum of Rs.3,000/-. In this behalf it was submitted that the instant act of the prosecutrix exhibits that she had taken money from her father's house to make good her escape in the company of the accused-appellant Jarnail Singh. It is sought to be inferred from the above, that the prosecutrix VW - PW6 had gone with the accused-appellant Jarnail Singh, of her own free will. And, that she had sexual intercourse with him consensually. For the reasons indicated hereinabove, it was the vehement contention of the learned counsel for the accused-appellant Jarnail Singh, that the courts below had seriously erred in recording the appellant's conviction under Sections 366, 376 and 120-B of the Indian Penal Code.

14. We have given our thoughtful consideration to the first contention advanced at the hands of the learned counsel for the accused-appellant. We shall venture to determine the factual aspects taken into consideration by the learned counsel for the appellant, to substantiate the alleged free will and consent of the prosecutrix VW - PW6 individually ,so as to effectively determine the veracity of the submissions noticed above.

15. In so far as the issue of having gone with the accused-appellant Jarnail Singh of her own free will, and of having had

A sexual intercourse with him consensually, it is necessary only to examine the uncontested deposition of the prosecutrix VW - PW6. In this behalf, it may be pointed out, that in her statement recorded under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate, First Class, Jagadhari on B 6.4.1993, the prosecutrix VW – PW6 had expressly asserted, that she was forcibly taken away on 25.3.1993, when she had gone out of her house to urinate in the street, by Jarnail Singh and his three accomplices. She had clearly and categorically testified, that all the four had caught hold of her. They had made C her inhale something, which rendered her unconscious. She had further stated, that the accused-appellant Jarnail Singh and his accomplices, had then taken her to some unknown place in Uttar Pradesh in a vehicle where Jarnail Singh forcibly attempted to commit intercourse with her. At that juncture, she D had slapped Jarnail Singh on his face, but in order to subjugate her, he had put a cloth in her mouth to prevent her from raising an alarm. Thereafter, the accused-appellant Jarnail Singh and his accomplices had committed forcible intercourse with her, one after the other. In her statement before the Trial Court, where she appeared as PW6, she had reiterated clearly the position E of having been taken away by the accused-appellant Jarnail Singh, and his three accomplices. She affirmed, that she was taken away in a tanker to Uttar Pradesh and then all the accused had committed rape on her in a small room. On the aforestated aspect of the matter, she was not subjected to F cross-examination at the behest of the accused. Only a suggestion was put to her, that she had persuaded the accused-appellant Jarnail Singh to take her away, in order to perform marriage with her, and for the said purpose had taken away cash, clothes and jewellery from her own residence. The G aforestated suggestion was denied by the prosecutrix VW - PW6. Keeping in view the statement of the prosecutrix VW - PW6 under Section 164 of the code of Criminal procedure before the Judicial Magistrate, First Class, Jagadhri, as also, the statement made by her while appearing before the trial court, H and the manner in which she was subjected to cross-

examination, there is no room for any doubt, that the prosecutrix was forcefully taken away, and that, she was subjected to rape at the hands of the accused-appellant Jarnail Singh and his three accomplices. It may still have been understandable, if the case had been, that she had consensual sex with the accused-appellant alone. But consensual sex with four boys at the same time, is just not comprehensible. Since the fact, that the accused-appellate Jarnail Singh and the prosecutrix VW – PW6 had eloped together is not disputed. And furthermore, since the accused-appellant having had sexual intercourse with the prosecutrix is also the disputed. It is just not possible to accept the proposition canvassed on behalf of the accused-appellant. We, therefore, find no merit in the instant submission.

16. The contention advanced at the hands of the learned counsel for the accused-appellant Jarnail Singh, that while leaving her house on 25.3.1993, the prosecutrix VW – PW6, had taken away a sum of Rs.3,000/-, needs a holistic examination. Whilst it is true that in the complaint, Jagdish Chandra (PW8), the father of the prosecutrix VW - PW6, had categorically mentioned that a sum of Rs.3,000/- was missing from his residence, and the said fact was duly mentioned in his complaint to the police dated 27.3.1993, yet he had not accuse the prosecutrix VW - PW6 for having taken it away. The instant aspect, in our considered view pales into insignificance, on account of the statement made by Jagdish Chandra (PW8) before the Trial Court. During the course of his deposition before the Trial Court, he had asserted, that he had mentioned that a sum of Rs.3,000/- was missing from his residence, but his wife Savitri Devi had found the aforesaid money from the residence itself, a few days later. Accordingly, the assertion made by the learned counsel representing the accused-appellant to the effect that the prosecutrix VW - PW6 had taken away a sum of Rs.3,000/-, when she left the house of her father on 25.3.1993, cannot be stated to have been duly proved. Besides the aforesaid, it is apparent from the cross-examination of the prosecutrix VW - PW6, that a suggestion

A was put to her that besides cash, she had taken away clothes and jewellery at the time of leaving her father's house on 25.3.1993. The prosecutrix VW - PW6 expressly denied the suggestion. There is no material on the record of the case to substantiate the said allegation. Therefore, it is not possible for B us to accept the accusation levelled by the accused-appellant Jarnail Singh against the prosecutrix VW - PW6, either on the issue of having taken away a sum of Rs.3,000/- while leaving her house, or that she left her house on 25.3.1993 along with clothes and jewellery. Accordingly, the inference drawn by C assuming the said factual position as true, simply does not arise.

17. The first contention advanced at the hands of the learned counsel for the appellant can be conveniently determined from another perspective. The High Court in the D impugned order arrived at the conclusion that the prosecutrix VW - PW6 was a minor at the time of occurrence on 25.3.1993, and had concluded, that even if she had accompanied the accused-appellant Jarnail Singh on 25.3.1993 of her own free consent, and even if she had had sexual intercourse with the E accused consensually, the same would be immaterial. For, consent of a minor is inconsequential.

18. During the course of hearing of the present appeal, learned counsel for the appellant vehemently contested the F determination of the High Court in the impugned judgment, wherein it had concluded, that the prosecutrix VW - PW6 was a minor. Insofar as the instant aspect of the matter is concerned, it was pointed out, that the sexual organs of the prosecutrix VW - PW6 were found to be fully developed by Dr. Kanta Dhankar- G PW1. Her hymen was found to be ruptured. It was also seen during the medico-legal examination of the prosecutrix VW - PW6, that the vagina admitted two/three fingers easily. Learned counsel for the appellant-accused Jarnail Singh, also invited our attention to the cross-examination of Dr. Kanta Dhankar- (PW1), wherein she acknowledged having mentioned the age H

of the prosecutrix VW - PW6 as 15 years, on the basis of the statement made by the prosecutrix to her. Dr. Kanta Dhankar-PW1 had also acknowledged, that she had not got the ossification test conducted on the prosecutrix VW - PW6 to scientifically determine the age of the prosecutrix. Based on the aforesaid, it was averred that there was no concrete material on the record of the case, on the basis of which it could have been concluded by the High Court, that the prosecutrix was a minor on the date of occurrence.

19. In order to support his contention, that the prosecutrix was not a minor at the time of occurrence, learned counsel for the appellant placed reliance on the judgment rendered in *Sunil vs. State of Haryana,* AIR 2010 SC 392. Ordinarily, we would have extracted the observations on which reliance was placed, but for reasons that would emerge from our conclusion, we consider it inappropriate to do so.

20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

> **"12. Procedure to be followed in determination of Age.?** (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical

A appearance or documents, if available. and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the B Committee by seeking evidence by obtaining –

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

C (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; D

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case E 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 F 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 G 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.

(4) If the age of a juvenile or child or the juvenile in conflict H with law is found to be below 18 years on the date of

offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over

A an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can B be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other C material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would D conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

E 21. Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW - PW6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied upto class 3 only, and thereafter, had left her school and had F started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW-PW6, on the next available basis, in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW4), to prove the G age of the prosecutrix VW – PW6. Satpal (PW4) was the Head Master of the Government High School, Jathlana, where the prosecutrix VW - PW6 had studied upto class 3. Satpal (PW4) had proved the certificate Exhibit-PG, as having been made on the basis of the school records indicating, that the H prosecutrix VW - PW6, was born on 15.5.1977. In the scheme

contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view, that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW – PW6. It would also be relevant to mention, that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW-PW6. The deposition of Satpal-PW4 has not been contested. Therefore, the date of birth of the prosecutrix VW - PW6 (indicated in Exhibit P.G., as 15.7.1977) assumes finality. Accordingly it is clear, that the prosecutrix VW-PW6, was less than 15 years old on the date of occurrence, i.e., on 25.3.1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW - PW6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW-PW6 had accompanied the accused-appellant Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.

22. Since the judgment relied upon by the learned counsel for the appellant is distinguishable on facts. And since the judgment relied upon, had not made any reference to the 2007 Rules, we are of the view that the same would not be relevant for the purposes of determining the age of the prosecutrix VW - PW6, specially in the background of the evidence led by the prosecution through Satpal (PW4) to establish.

23. The next contention advanced at the hands of the learned counsel for the accused-appellant Jarnail Singh was, that the oral testimony of the prosecutrix VW - PW6 ought not to be accepted as sufficient to return a finding of guilt against the accused-appellant Jarnail Singh. Insofar as the testimony of the prosecutrix VW - PW6 is concerned, it is pointed that

A there were a number of discrepancies and contradictions therein. It was submitted, that such discrepancies can be seen on a comparison of her deposition before the trial Court, with the statement of the prosecutrix recorded under Section 164 of the Code of Criminal Procedure on 6.4.1993, as also, the B statement of the prosecutrix recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure on 29.3.1993.

24. We have given our thoughtful consideration to the above noted submission, advanced at the hands of the learned C counsel for the appellant. We, however, find no merit therein. It is not as if the prosecution version is entirely based on the statement of the prosecutrix VW - PW6. It would be relevant to mention, that her recovery from the custody of the accused-appellant Jarnail Singh from the house of Shashi Bhan, at D Raipur, is sought to be established from the statement of Moti Ram-PW3. There can therefore be no room for any doubt, that after she was found missing from her father's residence on 25.3.1993, and after her father Jagdish Chandra-PW8 had made a complaint to the police on 27.3.1993, she was E recovered from the custody of the accused-appellant Jarnail Singh. Thereafter, the prosecutrix VW - PW6 was subjected to medico-legal examination by Dr. Kanta Dhankar-PW1 on 29.3.1993 itself at 3.00 p.m. Dr. Kanta Dhankar-PW1, in her independent testimony, affirmed that she had been subjected F to sexual intercourse, inasmuch as her hymen was found ruptured. Even though the visual examination of the prosecutrix VW – PW6, during the course of her medico-legal examination did not reveal the presence of semen or blood, yet the report of the forensic science laboratory (Exhibit PL) and of the G Serologist (Exhibit PL/1) clearly establish the presence of semen on her salwar, underwear and pubic hair. The serologist's report also disclose, medium and small blood stains on her "salwar". In her own deposition, she had mentioned that, when she was raped by the accused-appellant Jarnail H Singh and his accomplices, bleeding had taken place and she

had felt pain, and her clothes were stained with blood. Her deposition stands scientifically substantiated by Exhibits PL and PL/1. The suggestion put to the prosecutrix VW – PW6 at the behest of the accused-appellant Jarnail Singh, during the course of her cross-examination, that she had accompanied the accused-appellant Jarnail Singh, of her own free will and had had sexual intercourse with him consensually, leaves no room for any doubt, that she was in his company, and that, he had had sexual intercourse with her. The assertion that the prosecutrix VW – PW6 had accompanied the accused-appellant Jarnail Singh, and had had sexual intercourse with him consensually is completely ruled out, because as per the substantiated prosecution version, the prosecutrix VW - PW6 was not taken away by the accused-appellant Jarnail Singh alone, but also, by his three accomplices. All the four of them had similarly violated her person. Additionally, in her statement under Section 164 of the Code of Criminal procedure, the prosecutrix VW - PW6 had asserted, that in the first instance, after having caught hold of her, the accused had made her inhale something from a cloth which had made her unconscious. Thereafter, when the accused-appellant Jarnail Singh attempted to commit intercourse with her, she had slapped him. He had then put a cloth in her mouth, to stop her from raising an alarm. Thereafter, each one of the accomplices had committed forcible intercourse with her in turns. The factum of commission of forcible intercourse by the accused-appellant, as also, his accomplices was reiterated by her during her testimony before the Trial Court as PW6. Besides the aforesaid, there is a statement of her own father, Jagdish Chandra (PW8) who also in material particulars had corroborated the testimony of the prosecutrix VW - PW6. The prosecutrix VW – PW6, was not subjected to cross-examination on any of these issues. Nor was the prosecutrix confronted with either the statements made by her under Section 161 or Section 164 of the Code of Criminal Prosecution, so as to enable her to explain discrepancies, if any. Therefore, we find no merit at all, in the submission advanced by the learned counsel. In the above view of the

A matter, we are satisfied that there was substantial material corroborating the statement of the prosecutrix VW - PW6, for an unequivocal determination of the guilt of the accused-appellant Jarnail Singh.

B 25. No other submission besides those dealt with hereinabove, was advanced at the hands of the learned counsel for the appellant. For the reasons recorded above, we find no merit in the instant appeal and the same is accordingly dismissed.

C B.B.B. Appeal dismissed.