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Delivered on : 13.01.2026
A.F.R.



HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 452 of 2021

Bhagwat Kushwaha

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Abhishek Mayank, Abhishek Srivastava, Arbaz Danish, Vipin Kumar, Zia Naz Zaidi
Counsel for Respondent(s)	:	G.A., Rajesh Kumar Singh, Vinay Kumar Singh

In Chamber

HON'BLE ACHAL SACHDEV, J.

1. Heard Sri Abhishek Mayank, learned counsel for the appellant, Sri Vinay Kumar Singh, learned counsel for the informant and Sri Sanjay Singh, learned A.G.A.-I for the State.
2. This criminal appeal has been filed by the appellant against the judgement and order dated 05.09.2019 and sentence order dated 06.09.2019 passed by Special Judge (POCSO), Additional Sessions Judge, Court No.07, District- Jhansi, in Special Sessions Trial No. 41 of 2015 (State of U.P. Vs. Bhagwat Kushwaha) arising out of Case Crime No. 64 of 2015, Police Station- Sakrar, District- Jhansi, whereby the appellant has been convicted and sentenced to undergo five years imprisonment and fine of Rs.10,000/- u/s 366 I.P.C. and ten years imprisonment and fine of Rs.20,000/- u/s 376 I.P.C. along with default stipulation.

3. The facts of the case in brief, as per the prosecution case are that on 28.05.2015 at 12:25 pm, a written report was made by the informant Ramswaroop, son of Ghanshyam, resident of village- Luhari, Police Station- Sakrar, District- Jhansi stating that his daughter had gone missing since 3:00 am on 28.05.2015 and then they realized that their daughter had been kidnapped by Bhagwat, son of Munnu Kushwaha, of their village.

4. The police registered a criminal case as Case Crime No. 64 of 2015 dated 28.05.2015 on the basis of the information against the appellant, Bhagwat under Sections 363, 366 and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes Act (hereinafter referred to as the 'S.C./S.T. Act') and commenced investigation.

5. The victim was recovered by the police on 29.05.2015 from Mauranipur railway station by the police and her statement was recorded and medical examination was conducted on 30.05.2015 and ossification test for determination of age was done on 02.06.2015 wherein the victim was found to be aged 17 years. The statement of the victim was recorded before the Magistrate on 04.06.2015. The accused/appellant was arrested on 04.06.2015. The Investigating Officer, after completion of evidence, filed charge-sheet against the accused/appellant under Sections 363, 366 and 376 I.P.C., Section 4 of Protection of Children from Sexual Offences Act (hereinafter referred to as the 'POCSO Act') and Section 3(2)(v) of the S.C./S.T. Act.

6. The trial court, after taking cognizance of offences described in the charge-sheet, after giving the appellant an opportunity of being heard, framed charge under Sections 363, 366 and 376 I.P.C., Section 3/4 POCSO Act and Section 3(2)(v) of the S.C./S.T. Act.

7. The prosecution examined 8 witnesses to prove their case and has proved 8 documents in documentary evidence. The list of witnesses examined is as follows :-

S.No.	Name of witness	Category	Document proved
PW-1	Ramswaroop	Informant (father of victim & witness of fact)	Exhibit Ka'11 (Written Report)
PW-2	Rajkumari	mother of victim & witness of fact	--
PW-3	Victim designated X	Victim	Exhibit Ka' 1 & 2 (statement of victim under s.164 Cr.P.C.)
PW-4	Dr. Rashmi Singh Kushwaha	Medico Legal (Formal witness)	Exhibit Ka'3 (Medico Legal Examination report) Exhibit Ka'4 Supplementary report
PW-5	Dr. M.S. Rajput	Pathologist	Exhibit Ka'5 (Vaginal smear examination report)
PW-6	Dr. Rajendra Singh	Radiologist (formal witness)	Exhibit Ka'6 (Ossification test report)
PW-7	Jitendra Kumar Dubey	Investigation officer	Exhibit Ka'7 (Charge Sheet) Exhibit Ka'8 (site plan)
PW-8	Constable Magan Singh	Constable clerk	Exhibit Ka'9 (FiR) Exhibit Ka'10 (General Diary entry no.25)

8. Their testimony, in brief, is enumerated hereunder –

(i) PW-1 Ramswaroop is the informant of the case and father of the victim. The informant is not an eye witness. The informant, in his evidence before the court, in his examination in chief, has stated that on 28.05.2015, they were sleeping inside their house and their daughter, the victim was also sleeping on rooftop of the house. They were sleeping under neem tree. That at around 3:00 hrs at night, when his wife woke up, she found that their daughter (victim) was missing and she had been taken away by Bhagwat Kushwaha. On a previous occasion as well, the appellant took away his daughter and in relation to that incident, an F.I.R. was registered against him and the case is pending. His wife told him that Bhagwat was seen roaming around the house at night prior to the incident. In cross-examination, the witness states that his daughter was recovered after two days. For the sake of convenience, the written

application filed by PW-1 Ramswaroop at Police Station- Sakrar, District- Jhansi, is being reproduced hereunder :-

" निवेदन है कि प्रार्थी रामस्वरूप s/o घनश्यामदास अहिरवार निवासी लुहारी थाना सकरार झांसी विनीता D/O रामस्वरूप 12.00 बजे रात्रि में घर पर थी इस कारण हम लोग सो गये माँ रात्रि में तीन बजे जगी तो बच्ची नहीं मिली तो हमें ऐहसास हुआ तो भगवत s/o मन्त्र कुशवाहा का लड़का लेकर भाग गया 28/5/2015 की तारीख थी।

अतः श्री मान् जी से निवेदन है कि उचित कानूनी कार्यवाही करने की कृपा की जाय।"

(ii) PW-2 Rajkumari is mother of the victim and is not an eye witness.

(iii) PW-3 X is the victim and she in her examination-in-chief has stated before the court on oath that the incident took place at about 1½ year from today at 12 at night. Then the accused Bhagwat came to her house and forcibly took her with him and on the way in a field, he raped her. Then he took her to Mauranipur and from there, he took her to Jhansi by bus and after two days, he brought her back to Mauranipur from Jhansi and at Mauranipur Railway Station, the police had apprehended them and then brought them back to the police station and on 02.06.2015, she was brought to Mahila Thana where the police recorded her statement in which she had stated that Bhagwat had forcibly raped her in the field and on the same day, she was taken to the district hospital where her medical examination was conducted in the presence of her mother to which she has consented. The police produced her in the court where her statement was recorded by the Magistrate. The witness has proved the statement as Ext.Ka.2. In her examination-in-chief, the witness has stated that she forgot to tell the Magistrate about rape. In her cross-examination, the witness states that her father is a homeguard and further states that she does not remember the date of incident and she does not remember the month or year of the incident. Bhagwat came at 12 in the night to take her along with him and he had her open the door of the house and forcibly took her away. She raised an alarm but nobody heard it. Her father and mother were at home. The police recovered her after two days from Mauranipur. She further states that she went to Mau with Bhagwat and they reached Mau at 3 in the morning by bus and from there, he took her to Jhansi by bus. She raised an alarm but nobody heard it. Her statement was recorded in the Court u/s 164 Cr.P.C. in which she

did not tell that she loved Bhagwat and went along with him on her own will. The Magistrate has recorded wrong statement. She had told the Magistrate about her age being 18 years. The Magistrate recorded her incorrect statement. She did not tell the Magistrate about rape. Therefore, he did not write it in her statement. She raised alarm in Mau and she did not raise any alarm in Jhansi. She did not got along with Bhagwat of her own free will. She got married about one year back in Gwalior of her own free will and consent. Her father was on duty at the time of the incident. She is literate but did not take admission in school.

(iv) PW-4 is the doctor who had medically examined the victim on 30.05.2015 and had referred her for ossification test and had also obtained the vaginal swabs of victim to have them checked for presence of live or dead spermatozoa. The doctor did not find any external marks of injury on the body of the victim. On medical examination of the victim, he found that hymen of victim had old tear that had healed and after going through pathological examination report of vaginal smear, the doctor did not find any evidence of recent sexual activity.

(v) PW-5 Dr. M.S. Rajput conducted the pathological examination of vaginal smear and did not find any live or dead spermatozoa in the slides.

(vi) PW-6 Dr. Rajendra Singh conducted ossification test and took x-ray of the victim on 01.06.2015 in order to determine the age of the victim and opined the victim to be 17 years of age on following grounds :

Epiphyses around the elbow joint have fused, Epiphyses of lower ends of radius & ulna bones have lines of fusion seen, Epiphyses of inner ends of both clavicles have not fused, Epiphyses around the knee joint have fused, secondary ossification centre of iliac crest have not fused.

The X-Ray plates have not been produced in evidence by the prosecution.

(vii) PW-7 Jitendra Kumar Dubey is the Investigating Officer of the case.

(viii) PW-8 Constable Magan Singh was Constable clerk at Police Station- Sakrar.

9. After recording prosecution evidence, statement of appellant was recorded under Section 313 Cr.P.C. wherein the appellant alleged false implication and the witnesses were inimical due to village rivalry.

10. However, the appellant did not produce any evidence in his defence.

11. After hearing the arguments of prosecution and defence, the trial court acquitted the accused/appellant of charge under Section 363 I.P.C., Section 3 read with 4 of the POCSO Act and Section 3(2)(v) of S.C./S.T. Act.

12. The trial court found the appellant guilty of offence under Section 366 I.P.C. and convicted the appellant to imprisonment for a term of 5 years and fine of Rs.10,000/- and in default, the appellant had to undergo further imprisonment for a term of 3 months.

13. The trial court found the appellant guilty of offence under Section 376 I.P.C. and convicted the appellant to rigorous imprisonment for a term of 10 years and fine of Rs. 20,000/- and in default, the appellant had to undergo further imprisonment for a term of 6 months.

14. Hence the present appeal.

15. Heard learned counsel for the appellant, learned A.G.A. and learned private counsel for the victim and perused the record of the case.

16. Learned counsel for the appellant submits that despite the fact that the trial court itself had held the victim to be a major, it ignored the medical evidence produced by the prosecution which does not support prosecution case and failed to apply judicial mind diligently when holding the appellant guilty of offence under Section 363 I.P.C. and Section 376 I.P.C. The appellant has been falsely implicated.

17. Learned A.G.A. and learned counsel for the informant have submitted that the trial court judgment does not suffer from any irregularity and the trial court has rightly convicted the appellant of the offences charged after correct appreciation of evidence on record.

18. Perused the record.

19. The informant of the case PW-1 is father of the victim. The First Information Report was registered at the police station on 28.05.2015 at 12:25 hrs and the victim was recovered by the police on 29.05.2015 and the victim was medically examined on 30.05.2015. An ossification test for determination of age was conducted on 02.06.2015 wherein the victim was held to be 17 years old. The ossification report has been proved as Exhibit Ka'6 by radiologist PW-6 Jitendra Kumar Dubey. The appellant/accused was arrested on 04.06.2015.

20. As per the evidence of the radiologist PW-6, the victim was 17 years old and a minor.

21. The Hon'ble Supreme Court, in the case of **Jarnail Singh Vs State of Haryana, 2013 AIR SC 3467**, in para 22 & 23, has outlined the procedure to be adopted for the determination of the age of a minor victim :-

"..22. On the issue of the determination of the 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 aforementioned 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 the 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 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 Committee by seeking evidence by obtaining (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a

panchayat; (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 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.

(4) If the age of a juvenile or child or the juvenile in conflict 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 7-A, 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 of 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 an appropriate order in the interest of the juvenile in conflict with law.

23. 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 of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with the 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, PW 6. 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 an overriding effect over 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), a matriculation (or equivalent) certificate of the child concerned 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 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 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 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 the age of the child concerned, on the basis of medical opinion.”

22. Section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015 provides-

"94. (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination by seeking evidence by obtaining

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age

determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of a person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person. (emphasis supplied)"

23. Before proceeding further, the provisions of law involved in this appeal must be referred to :-

Section 27 of the POCSO Act -

"27. Medical examination of a child. (1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution."

Section 164 of the Code of Criminal Procedure, 1973 (as amended) --

164A. Medical examination of the victim of rape -

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman

shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely :

- (i) the name and address of the woman and of the person by whom she was brought;*
- (ii) the age of the woman;*
- (iii) the description of material taken from the person of the woman for DNA profiling;*
- (iv) marks of injury, if any, on the person of the woman;*
- (v) general mental condition of the woman; and*
- (vi) other material particulars in reasonable detail.*

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf. Explanation. For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.

Section 29 of The Protection Of Children From Sexual Offences Act, 2012 -

"29. Presumption as to certain offences - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 defines a child means a person who has not completed eighteen years of age;

24. Section 34 of The Protection Of Children From Sexual Offences Act, 2012 prescribes the authority and procedure for the determination of the age of a minor in conflict with law/minor victim.

34. Procedure in case of commission of offence by a child and determination of age by the Special Court -

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person, and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person determined by it under sub-section (2) was not the correct age of that person.

25. In **Rishipal Singh Solanki, (2022) 8 SCC 602**, this Court, while dealing with an appeal filed by the father of the deceased, noted the difference between the Rules 2007 and the JJ Act 2015. It was observed:

"29. The difference in the procedure under the two enactments could be discerned as under:

29.1. As per the JJ Act, 2015, in the absence of the requisite documents as mentioned in clauses (i) and (ii) of Section

94(2), there is a provision for the determination of the age by an ossification test or any other medical age-related test to be Conducted on the orders of the Committee or the JJ Board as per Section 94 of the said Act; whereas, under Rule 12 of the JJ Rules, 2007, in the absence of relevant documents, a medical opinion had to be sought from a duly constituted Medical Board which would declare the age of the juvenile or child.

29.2. With regard to the documents to be provided as evidence, what was provided under Rule 12 of the JJ Rules, 2007, has been provided under sub-section (2) of Section 94 of the JJ Act, 2015 as a substantive provision.

29.3. Under Section 49 of the JJ Act, 2000, where it appeared to a competent authority that a person brought before it was a juvenile or a child, then such authority could, after making an inquiry and taking such evidence as was necessary, record a finding as to the juvenility of such person and state the age of such person as nearly as may be. Sub-section (2) of Section 49 stated that no order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order had been made is not a juvenile and the age recorded by the competent authority to be the age of person so brought before it, for the purpose of the Act, be deemed to be the true age of that person.

26. The trial court, in its judgement, in absence of any documentary evidence produced by the prosecution relating to age of the victim, placing reliance on ratio given in the case of **Mahadeo Vs. State of Maharashtra, (2013)14 SCC 637** and **Jaimala Vs. Secretary (Home), State of J&K, AIR 1982 SC**, while considering the ossification test report, held that the victim was above 18 years of age and was a major at the time of the incident. The finding of trial court on point of victim being a major has not been assailed by way of appeal and in absence of any documentary evidence in regard to age of the victim on record and in light of ratio of various case law of Hon'ble Supreme Court, the finding of trial court needs no interference.

27. Because the victim was major at the time of incident, the finding of trial court acquitting the appellant of charge under Section 363 I.P.C. and Section 3/4 POCSO Act need not be interfered with.

28. The trial court has held that the charge under Section 3(2)(v) of the S.C./S.T. Act is not made out on the basis of evidence on record and has acquitted the appellant of charge under Section 3(2)(v) of the S.C./S.T. Act. The finding needs no interference.

29. Now the question that crops up in the mind is whether the victim was abducted and raped by the appellant ?

30. Insofar as charge under Section 366 I.P.C. and 376 I.P.C. is concerned, consent is a fundamental aspect to constitute an offence under Section 366 and 375 of the Indian Penal Code (I.P.C.).

31. Legally, consent refers to an unequivocal, voluntary, and informed agreement to engage in a specific act. Within the framework of Section 375 I.P.C., consent must be given freely without any form of coercion, manipulation, or deception. The Supreme Court of India has emphasized that consent must involve an active and willing participation from the woman, rather than mere submission or acquiescence resulting from fear or pressure.

32. Section 366 of the Indian Penal Code, 1860 qualifies as minor offence of kidnapping, abducting, or inducing a woman to compel her marriage or engage her in illicit intercourse with someone other than her husband. This provision has played a significant role in the freedom given to women. Furthermore, it has been a deterrent to those heinous crimes that violate fundamental rights and dignity.

33. **Section 366 of the I.P.C. :-** ‘Kidnapping, abducting or inducing woman to compel her marriage, etc.’ states :

“Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.”

34. Section 366 I.P.C. incorporates specific elements that must be established to constitute an offence. These elements are :

“Such accused must be found guilty of having actually committed the act of either kidnap or abduction as defined sections 359 and 362 of IPC. Kidnapping refers to the act of taking a minor away without the consent of the natural guardian, whereas abduction, on the other hand, implies forcing a person to move from one place to another by threat, deceit, or coercion.”

35. Section 375 I.P.C. defines offence of “Rape” and Section 376 I.P.C. provides the punishment for offence of “Rape”.

36. Section 375 of the Indian Penal Code is one of the most crucial provisions in the context of sexual offences, specifically defining the crime of rape. This section outlines the conditions under which a sexual act is considered rape, emphasizing the lack of consent as the central element. The legal definition provided by Section 375 I.P.C. is vital for several reasons.

37. First and foremost, Section 375 I.P.C. offers a clear and precise definition of rape, helping to eliminate ambiguities that could otherwise lead to misinterpretation and miscarriage of justice. By specifying conditions such as ‘against her will’ and ‘without her consent,’ the law delineates the boundaries of lawful and unlawful sexual conduct, thereby protecting the bodily autonomy and dignity of individuals.

38. Secondly, addressing and understanding the legal definition of rape is essential for ensuring justice for survivors of sexual violence. Clear legal provisions aid in the prosecution of offenders and provide a framework for the judicial system to deliver appropriate penalties. Moreover, it fosters a legal environment where survivors feel supported and are more likely to come forward to report offences.

39. Furthermore, the importance of Section 375 I.P.C. extends beyond the legal realm, influencing societal attitudes towards sexual violence. It underscores the severity of rape as a crime and promotes a culture of respect for consent and personal boundaries. By doing so, it plays a

crucial role in the broader fight against gender-based violence and in fostering a society that upholds the rights and dignity of all individuals.

40. Section 375 of the Indian Penal Code (I.P.C.) defines the offence of rape in India. The legal text reads as follows :-

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

- 1. Against her will.*
- 2. Without her consent.*
- 3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*
- 4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*
- 5. With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*
- 6. With or without her consent, when she is under sixteen years of age.*

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

41. This legal definition outlines the conditions under which sexual intercourse is considered rape, emphasizing the importance of consent and the circumstances that nullify it.

42. To understand the legal framework of Section 375, it's crucial to delve into the elements that constitute the crime of rape :

- **Against Her Will:** This element implies that the woman has not agreed to the sexual act under any circumstances. It focuses on the lack of voluntary participation.

- **Without Her Consent:** This highlights the absence of the woman's approval or agreement. Consent must be explicit, and its absence constitutes rape.
- **Consent Obtained Under Fear:** If a woman's consent is obtained through threats of death or hurt to her or someone she cares about, it is considered coerced and invalid.
- **Consent Under Misconception of Identity:** When a woman consents believing the man to be her husband, but he is not, the consent is deemed invalid.
- **Consent Given Under Unsound Mind or Intoxication:** If a woman is incapable of understanding the nature and consequences of her consent due to intoxication, unsoundness of mind, or influence of drugs, the consent is considered invalid.
- **Age Factor:** Sexual intercourse with a girl under sixteen years, with or without consent, is considered rape. This age limit underscores the protection of minors from sexual exploitation.

The phrases 'against her will' and 'without her consent' are pivotal in understanding the crime of rape under Section 375 :-

- **Against Her Will:** This means that the act was done despite the woman's resistance. It indicates force or threat, rendering the woman's lack of agreement evident. The absence of willingness is a clear indicator of non-consent.
- **Without Her Consent:** This encompasses situations where the woman may not actively resist due to fear, confusion, or manipulation, but does not give voluntary, affirmative, and informed agreement to the act. Consent must be an active, enthusiastic, and informed decision, not just the absence of a 'no'.

43. Understanding these elements is crucial for comprehending the nuances of Section 375 and recognizing the importance of consent in sexual relations. It helps in ensuring that the legal framework protects

individuals from sexual violence and upholds their autonomy and dignity.

44. The Hon'ble Supreme Court of India in the case of **Kaini Rajan Vs. State Of Kerala, (2013) 9 SCC 113**, in paragraph 12 has explained the essential ingredients of offence of rape where doubts persist as to whether the victim had consensual sexual relation with the offender. The paragraph 12 of the aforementioned judgment is being reproduced –

“..12. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

45. Several scenarios can invalidate consent under Section 375, rendering any sexual act committed under these circumstances as rape. These include:

- **Under Threat or Coercion:** If consent is obtained by putting the woman or someone she cares about in fear of death or serious harm, it is considered coerced and invalid.

46. Learned counsel for the appellant has drawn attention of the Court towards the finding given by the trial court on point that the victim was a

major at the time of alleged offence. The learned counsel for the appellant further submits that the victim had a consensual sexual relation with the appellant and the victim, in her statement recorded before the Magistrate under Section 164 Cr.P.C., has admitted the fact that the victim was in love with the appellant and she went along with the appellant on her own volition. The Investigation Officer (PW- 7), in his cross examination before the Court has also lend credence to the aforesaid fact when he stated that victim never stated in her statement before the Magistrate that she was raped by the appellant. Learned counsel for the appellant has further submitted that the trial court, despite noting the anomalies in evidence of the victim where she clearly resiled from her statement before the Magistrate, and the medical evidence does not support the prosecution story that the victim had been raped by the appellant/accused but the trial court relied on the improbabilities prosecution in evidence while holding the appellant guilty.

47. For the sake of convenience, the statement of the victim recorded u/s 164 Cr.P.C. is being reproduced hereunder :-

"नाम-विनीता उम्र-18 वर्ष पुत्री रामस्वरूप नि०-लुहारी थाना सकरार जिला झांसी ने बयान दिया कि दिनांक 28/5/15 को सुबह 05.00 बजे भगवत निवासी लुहारी के साथ झांसी आ गई वहां से मऊ गई मऊ में रात भर स्टेशन पर रही। भगवत को मैं प्रेम करती थी इसलिए अपनी मर्जी से चली गई। मार्कशीट में उम्र 14 वर्ष है। उम्र कम लिखाई थी। मैं अहिरवार जाति की हूँ। प्रमाणित किया जाता है कि बयान उपरोक्त पीड़िता विनीता के बोलने पर शब्द व शब्द खुले व खाली न्यायालय में लिखे एवं पढ़कर सुनाया गया।"

48. Such a crime can include anything- criminal intimidation, abuse of authority, or compulsion of any other genre, which creates an atmosphere for the woman to go against her free will and act as per the whims and fancy of the accused. Criminal intimidation, as defined in Section 503 I.P.C. includes threats causing a reasonable apprehension in the mind of that person towards harm in order to get that person to act.

49. Consent plays a crucial role in cases of Section 366 cases. If a woman is kidnapped or induced against her will, the act is punishable.

The law aims to ensure that any compulsion, force, or abuse of authority to undermine consent is addressed.

50. The victim, in her evidence before the trial court as PW-3, in her examination in chief, has stated that the accused Bhagwat came to her house and forcibly took her with him and on the way, he forcibly raped her in the field and then he took the victim to Mauranipur and from there, he took the victim to Jhansi by bus.

51. The victim, in her cross examination, has stated that the accused Bhagwat came at 12:00 at night and she had opened the door; that he forcibly took her; that she had raised alarm but no one listened; that her mother and father were at home. The victim, in her cross examination, has averred to the fact that she raised alarm at Mauranipur but did not raise any alarm at Jhansi.

52. The trial court, instead of analyzing the evidence of the victim on point of consent and as reliable witness, has chosen to cast burden on accused that the counsel for the accused/appellant failed to put question to the witness other than the fact that she did raise alarm but nobody came and on that ground alone, the evidence of victim cannot be disbelieved. The trial court, in regard to victim resiling from facts in her statement before the Magistrate under Section 164 Cr.P.C. that the victim was in love with the accused/appellant and went along with him on her own volition, has held that the statement of victim before a Magistrate is only a corroborative piece of evidence and not substantive evidence, ignored the circumstances prevalent at the time of recording of her statement before the Magistrate. The statement of the victim given to the doctor at the time of her medical examination is of paramount importance wherein the victim nowhere stated that she was forcibly taken away by the appellant from her father's house or that the appellant had deceived her into leaving her house on the day of the incident.

53. In a criminal trial, the burden of proof initially rests with the prosecution and the prosecution is duty bound to discharge the initial burden before the accused can be cast upon the accused to lead evidence of his innocence. It is not expected of a trial court to base its finding on

accused not asking a particular set of questions, but the court has to see that the prosecution has successfully discharged its burden before accused may be expected to answer the same.

54. The judgment passed by the trial court is founded on sole testimony of the victim. The informant (PW-1) and mother of the victim (PW-2) are not the eyewitnesses.

55. The Hon'ble Supreme Court, in the case of **State (GNCT of Delhi) Vs. Vipin @ Lalla, 2025 SCC OnLine SC 78**, in para 10, has observed that :-

“10. Although it is absolutely true that in the case of rape, conviction can be made on the sole testimony of the prosecutrix as her evidence is in the nature of an injured witness which is given a very high value by the Courts. But nevertheless when a person can be convicted on the testimony of a single witness the Courts are bound to be very careful in examining such a witness and thus the testimony of such a witness must inspire confidence of the Court. The testimony of the prosecutrix in the present case thus has failed to inspire absolute confidence of the Trial Court, the High Court and this Court as well.”

56. The victim, in her examination in chief, has stated that the appellant, at 12:00 hrs at night, made her open the door and forcibly took her and her mother and father were asleep. That she raised alarm but nobody listened. The victim, in her cross examination, has stated that at the time of the incident, she was sleeping on the roof top of her house and her mother and father were sleeping below. The victim further states that she had opened the door of the house and when appellant was forcibly taking her away, she had raised an alarm but nobody listened. PW-1 Ramswaroop, in his evidence, has stated that he was sleeping under a neem tree at the time of the incident at his home. It seems highly probable that when the victim was being forcibly abducted from her house and she had raised an alarm, the mother and father of the kept on sleeping and did not respond to alarm raised by their daughter and they realized that their daughter had been kidnapped at 3:00 hrs when they woke up at 3:00 hrs and did not find their daughter at home. The informant in her cross-examination states that her daughter was recovered on the 29th whereas the victim in her statement has stated that

she was recovered by the police from Mauranipur after two days i.e. not before 30th June and she was taken by the police of Police Station- Mahila Thana on 02.06.2015 and on the same day, she was taken to hospital for medical examination. The medical examination report of the victim is paper Ext.Ka.3 on record which is dated 30.05.2015. There are inherent contradictions in the statement of the victim and the informant as to the date on which police recovered her/she came back home but the trial court has failed to take these points into consideration.

57. The victim, in her statement before the Magistrate under Section 164 Cr.P.C., has stated that she was in love with the appellant and went along with him on her own volition. The victim, in her statement given to the doctor PW-4, has stated that she was sleeping on top of the roof of her house and she and the appellant went to Jhansi. The statement of the victim as recorded in Exhibit Ka'3 is being reproduced below--

“..27-28 मई की रात में मैं अपने घर की छत पर सो रही थी। जहाँ से मैं भागवत नाम के एक लड़के के साथ झाँसी चली गयी। वहाँ से मैं मऊ चली गयी। जहाँ मैं उस लड़के के साथ किसी जगह रुकी। जहाँ अगले दिन उस लड़के और मुझे पुलिस ने पकड़ लिया...”.

58. The victim, has made statement before the doctor in presence of her mother and undoubtedly, the victim was free from control and influence of the appellant. In the statement, the victim nowhere states that she was forcibly taken away from her house by the appellant and the appellant raped her in a field on the way. The statement is corroborated by statement of the victim made to the Magistrate under Section 164 Cr.P.C. but the fact has been ignored and unexplained in the impugned judgment of the trial court as to why the victim, while free from influence and control of the appellant, did not support the prosecution case regarding her abduction and rape by the appellant.

59. The victim, in her examination-in-chief has stated that on 02.06.2015, the police brought her to Mahila Thana where her statement was recorded wherein she told the police that Bhagwat had raped her and had forcibly made physical relations with her and on the same day, she was taken to district hospital for medical examination and her mother

was there with her. The witness, in her examination-in-chief has admitted the fact that her statement before the Magistrate was recorded. In her cross-examination, the victim states that she did not tell the Magistrate that she loved Bhagwat and she went with him on her own will and the Magistrate has wrongly recorded the above statement. The victim, in her cross-examination, has stated that she did not tell the Magistrate that she was raped and the Magistrate has not recorded the same due to this reason. The prosecution evidence nowhere states the reason for the Magistrate to record a statement of the victim that is in contradiction of statement made by the victim before the trial court.

60. Perusal of record shows that the medical examination of the victim was held on 30-05-2015 and the victim has wrongly stated that her medical examination was conducted on 02-06-2015. The victim, in her cross-examination, has admitted that she did not tell the Magistrate at the time of her statement about she being raped by the appellant. The trial court, in its judgment has failed to take into consideration the crucial aspect that the victim did not tell the doctor at the time of her medical examination that the appellant forcibly took the victim away. The statement made before the doctor was the earliest statement in point of time and the medical report also contains the finding that the hymen of the victim had old tear and was healed and there was no sign of bleeding or discharge and there was no external injury found on the examination of the victim. There is no possibility of the victim being tutored by her parents or police at the relevant point before the doctor. The doctor is an independent authority and the prosecution has concealed the fact that the victim made such a statement before the doctor.

61. Indeed, the finding of trial court is correct that the statement of victim recorded before a Magistrate is not substantive piece of evidence, but resiling from statement before a Magistrate under Section 164 Cr.P.C. casts shadow of doubt over integrity of witness whilst under examination on oath before the court and the prosecution must explain the circumstances under which statement of victim was recorded before the Magistrate, where the victim, at an earlier point of time, has given

statement to the doctor in regard to the incident wherein the victim did not support the prosecution case. The evidence of PW-4 Rashmi Singh Kushwaha, at this juncture assumes importance.

62. The victim was medically examined on 30-05-2015 at 3:00 pm. The medical examination report is Exhibit Ka'4. The examining doctor has, on examination, found that the hymen had old tear and was healed. The victim has stated before the doctor, that she was sleeping on roof and then she went along with the appellant to Jhansi. The prognosis of the examining doctor was that it was healed and there was no evidence of recent sexual activity. The trial court, in its judgment, in regard to opinion given in the medical report, has held that the incident took place on 25-05-2015 at 12:00 and the victim was medically examined after 5 days. The above finding of trial court is beyond the record as the FIR was registered on 28.05.2015 at 12:25 pm on application of informant Exhibit Ka'1 dated 28.05.2015. The finding of trial court on page 20 of the judgment has held that the medical examination of the victim was conducted on 30.05.2015 and the date of incident is 25.05.2015 at 12:00. The medical examination was conducted after 5 days. The finding of court while disbelieving the argument put forward by counsel that the medical examination report and vaginal smear report do not support the prosecution case against appellant, is perverse and condemnable and seems to be a deliberate attempt to conceal evidence favouring appellant in order to secure his conviction and is against the basic tenets of criminal law that the prosecution must discharge the burden before any opinion can be expressed on the merits of the case.

63. In rape cases under Section 376 of the Indian Penal Code (now Bharatiya Nyaya Sanhita), the burden of proof rests entirely on the prosecution to establish the accused's guilt beyond reasonable doubt. This principle stems from the ****presumption of innocence****, a fundamental tenet of criminal jurisprudence. The accused bears no obligation to prove their innocence unless a specific statutory provision shifts the burden (e.g., certain exceptions under the IPC or other laws). In rape prosecutions (not falling under aggravated forms listed in Section

376(2)), the prosecution must prove all elements of the offence, including:

- Sexual intercourse
- Lack of consent

The accused has no duty to lead evidence or disprove these elements. But a limited shift occurs under Section 114A of the Indian Evidence Act, 1872, applicable only to prosecutions under specified clauses of Section 376(2) I.P.C. (aggravated rape, e.g., by a person in authority). Here, if the prosecution proves sexual intercourse and the victim states in evidence that she did not consent, the court shall presume absence of consent, shifting the burden to the accused to rebut this presumption. Even then, the overall burden to prove the offence remains on the prosecution. Section 114A does not reverse the general presumption of innocence or require the accused to prove innocence in absent proof of the basic offence.

64. The Hon'ble Supreme Court rulings reinforce that unless a specific law imposes a negative burden, the accused need not lead evidence to prove innocence. The prosecution must establish guilt beyond reasonable doubt. The prosecution must prove the accused's guilt beyond reasonable doubt, while the accused enjoys the presumption of innocence and bears no burden to prove innocence.

65. Even in cases under Protection of Children from Sexual Offences Act, the burden of proof differs significantly from standard criminal law due to statutory presumptions that protects child victims, though the prosecution retains key responsibilities. Sections 29 and 30 of the POCSO Act introduce mandatory presumptions for offences under Sections 3 (penetrative sexual assault), 5 (aggravated penetrative sexual assault), 7 (sexual assault) and 9 (aggravated sexual assault) but even under the POCSO act, the presumptions do not absolve the prosecution entirely and the Courts consistently hold :

1. Prosecution must first prove "foundational facts" (basic elements like the victim's age being under 18, occurrence of the act, and identity of the accused) beyond reasonable doubt.

2. Only after these are established do the presumptions under Sections 29 and 30 activate.

3. Once activated, the burden shifts to the accused to rebut them (e.g., prove innocence or lack of culpable intent), typically on a balance of probabilities (preponderance of probability), not beyond reasonable doubt.

4. If foundational facts are not proven beyond reasonable doubt, presumptions cannot apply, and the accused must be acquitted. Supreme Court rulings reinforce that presumptions aid conviction where evidence is credible but do not replace the need for strong prosecution proof of basics and conviction cannot rest solely on presumptions without foundational evidence.

66. In non-POCSO rape cases (e.g., under IPC/BNS), the burden remains fully on the prosecution with no such mandatory presumptions (except limited ones like Section 114A Evidence Act for aggravated forms). POCSO's stricter approach reflects the vulnerability of child victims.

67. The Hon'ble Supreme Court, in the case of **Vijaya Singh & another vs. State of Uttarakhand, 2024 SCC Online SC 3510**, in paras 26, 27 and 31, has observed that a statement under Section 164 Cr.P.C. cannot be discarded on a mere statement of the witness that it was not recorded correctly and has observed further that a judicial satisfaction of the Magistrate, to the effect that the statement being recorded is the correct version of the facts stated by the witness, forms part of every such statement and a higher burden must be placed upon the witness to retract from the same. The court has observed further that to permit retraction by a witness from a signed statement recorded before the Magistrate on flimsy grounds or on mere assertions would effectively negate the difference between a statement recorded by the police officer and that recorded by the Judicial Magistrate.

68. On the basis of evidence of victim before the court, her statement before the Magistrate under Section 164 Cr.P.C. and medical

examination report, it can safely be concluded that the victim and the appellant were in relationship and the victim had left her father's house on 28.05.2015 on her own volition and there is no evidence on record from which it can be concluded that the victim had been enticed to go away from her father's house against her will or without her consent. There is no evidence on record, barring statement of victim before the trial court, that appellant forcibly imposed himself upon the victim and committed rape on her. The finding of trial court that the victim was a major at the time of occurrence makes the victim a consenting party and no criminal liability can be affixed upon the appellant where the victim herself, of her own volition, had left her father's house to go along with the appellant. The medical examination report and the vaginal smear report negates the prosecution version that the victim had been abducted and was forcibly raped by the appellant. The trial court has failed to appreciate the effect of totality of evidence on record and by misreading the date of incident to be 25.05.2015 instead of 28.05.2015, and thereby disbelieved the medical evidence on record, has committed a serious error in judging the appellant being guilty of offence under Sections 366 and 376 I.P.C.

69. In the light of the above discussion, the judgment and order of conviction passed by the trial court is not sustainable and is liable to be set-aside.

70. Hence, criminal appeal filed by appellant, Bhagwat Kushwaha, is **allowed**.

71. The judgment and order dated 05.09.2019 and sentence order dated 06.09.2019 are set-aside.

72. The appellant, Bhagwat Kushwaha, is in custody and lodged in jail. He is directed to be released forthwith, if not wanted in any other case. Before being released, the appellant shall execute personal bond in the sum of Rs.25,000/- under Section 481 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (corresponding to Section 437-A of Cr.P.C.) for his appearance, in the event of an appeal being preferred against his acquittal.

73. Let a copy of this judgment and order be sent to the trial court along with the trial court record for information and necessary compliance.

(Achal Sachdev,J.)

January 13, 2026

KS