REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 513 OF 2008

Darga Ram @ Gunga ...Appellant

Versus

State of Rajasthan ...Respondent

JUDGMENT

T.S. THAKUR, J.

1. The appellant was tried and convicted for offences punishable under Sections 376 and 302 IPC. For the offence of rape punishable under Section 376, he was sentenced to undergo imprisonment for a period of 10 years besides a fine of Rs.1000/- and default sentence of one month with rigorous imprisonment. Similarly, for the offence of murder punishable under Section 302 IPC, he was sentenced to

undergo life imprisonment besides a fine of Rs.3,000/- and default sentence of three months' rigorous imprisonment. Both the sentences were directed to run concurrently. Criminal Appeal No.604 of 2004 filed by him was heard and dismissed by a Division Bench of the High Court of Judicature for Rajasthan at Jodhpur. The present appeal assails the impugned judgment and order.

2. A first Information Report was registered at Police Station Rani in the State of Rajasthan on 11th April, 1998, *inter alia*, stating that the complainant on 9th April, 1998 had organised a "Jaagran" (night long prayer meet) near a well belonging to one Magga Ram. The complainant and other relatives, in all around 50 persons assembled for the "Jaagran" that continued till late night. This included his seven year old daughter-Kamala who went to sleep along with other children close to the place where the "Jaagran" was held. When he returned to his house he noticed that Kamala was missing. Assuming that she may have gone away with one of the relatives, a search was made at their houses but Kamala remained untraceable. The search was then extended to neighbouring areas where the dead body

of Kamala was discovered by Magga Ram (PW-5) and Pura Ram. On receipt of this information he and Naina Ram (PW-2) went to the place and found that baby Kamala had been raped and killed by crushing her head with a stone. The dead body of Kamala was, according to the report, lying on the spot.

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

4. Before the Sessions Court, the appellant pleaded not guilty and claimed a trial. At the trial the prosecution produced 19 witnesses apart from placing reliance upon several documents. No evidence in defence was, however, led by the appellant. By its judgment and order dated 27th January, 2004 the trial Court eventually held the appellant guilty and accordingly convicted and sentenced him as indicated above. Aggrieved by the judgment and order passed by the trial Court, the appellant preferred Criminal

Appeal No.604 of 2004 which was, upon reappraisal of the evidence adduced before the trial Court, dismissed by the High Court affirming the conviction recorded against the appellant and the sentence awarded to him for both the offences.

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

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6. The first and foremost is the deposition of Ota Ram (PW-4) which clearly establishes that the appellant was also one of those who had participated in the "Jaagran" along with other villagers. To the same effect is the statement of Maga Ram (PW-5) who too had testified that the appellant was present in the "Jaagran". He had seen Kamala at around 10.00 in the night. The deposition of both these witnesses

proves that apart from the appellant and several others, baby Kamala the deceased was also present at the "Jaagran" with other children and had gone off to sleep after taking dinner. That version is supported even by Naina (PW-1), who states that the appellant was also present in the "Jaagran" around mid night when the tea was served to those present including the appellant. The witness has further deposed that his son and daughter Kamala were sleeping around the place but Kamala was found missing in the morning. There is, in our opinion, no reason to disbelieve the version of these witnesses when they say that the "Jaagran" was held by the complainant in which Kamala his daughter was present and gone off to sleep nor is there any reason to disbelieve the story that even the appellant was present at the "Jaagran" and had tea with other witnesses around mid night.

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

that Kamala died a homicidal death on account of injury on her head. In the deposition, the doctor certified injuries even on her private parts. The post-mortem report certifies the following injuries on the person of the deceased:

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

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8. Rajendra Singh (PW-9), who investigated the case and who is a witness to the scene of occurrence, seized blood stained clothes of the deceased including two hair recovered from the private parts of the deceased. He is also witness to the seizure of blood stained clothes of the appellant on the basis of a disclosure statement made by him. Equally

important is the circumstance that the FSL report found the trouser and the shirt of the appellant to be stained with human blood belonging to group 'A' which happened to be the blood group of the deceased also. The stone used for crushing the head of the deceased was also found to be smeared with human blood of group 'A'.

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

“(i)	Abrasion	1x0.5 cm. Size	Dorsal Aspect of (Rt) Elbow joint.
(ii)	Abrasion	3x2 cm. Size	Medical Aspect of (Lt) Elbow joint.
(iii)	Multiple Abrasion	Varying in Size	Dorsal Aspect of (Lt) Elbow joint.
(iv)	Abrasion	7.5x1 cm. Size	Ant. aspect of (Rt.) leg Just below (Rt.) knee joint
(v)	Abrasion	1.5x1 cm.	Ant. aspect of (Lt.) knee joint
(vi)	Abrasion	1x0.5 cm.	Medial side of Ant. Aspect (Lt.) knee joint
(vii)	Abrasion	1x1 cm.	Lt. side of Ant. Aspect of (Lt.) knee joint
(viii)	Abrasion	1x0.5 cm.	Dorsal Aspect of Retracted Prepuce.

(ix)	Abrasion	2x0.25 cm.	Lat. Aspect of (Rt.) side of Retracted prepuce.
(x)	Abrasion	0.25x0.25 cm.	Dorsal Aspect of glans penis
(xi)	Abrasion	2x0.25 cm.	Lat. Aspect of (Rt.0 Thigh
(xii)	Abrasion	2x0.25 cm.	(Rt.) gluteal Region
(xiii)	Abrasion	2x1 cm.	(Lt.) Palm

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

10. No explanation was, however, offered by the appellant for the injuries sustained by him one of which was found even at his penis. To summarise, the prosecution has clearly established:

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

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

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

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

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

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

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

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

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

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

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

12. What remains to be addressed now is an application filed by the appellant in this Court seeking to raise a plea that the appellant was a juvenile on the date of the commission of offence hence entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000. Since the appellant did not have any documentary evidence like a school or other certificate referred to under the Act mentioned above, this Court had directed the Principal, Government Medical College, Jodhpur, to constitute a Board of Doctors for medical examination including radiological examination of the appellant to determine the age of the appellant as in April, 1998 when the offence in question was committed. The Superintendant of the Central Jail was

directed to ensure production of the appellant for the purpose of determination of his age before the Medical Board for carrying out the tests and examination. In compliance with the said direction, the Principal constituted a Medical Board for determining the age of the appellant and submitted a report dated 4th February, 2014. The report records the following findings and conclusions:

> "Age estimation of Darga ram @ Gunga s/o Heera on the basis of findings of X Ray of Elbow, Wrist, Pelvis, Sternum, Medial end of Clavicle, Skull and left shoulder joint (film no.10252 dated 04-02-2014, Eight Film and CT Scan of Skull and Mandible (film 56013, four films) dated 04-02-2014, is as below:-
>
> 1. All Epiphysis around elbow joint, lower end of Radius & Ulna, Ilias Crest & Ischial tuberosity & for medial end of Clavicle have appeared 7 fused, it suggests that his age is above 22 years.
>
> 2. All the body pieces of sternum have fused with each other but not fused with Xiphoid process & manubrium sternum, it suggests his age is above 25 years but below 40 years.
>
> 3. Posterior 1/3 of sagital suture have fused, it suggests his age is above 30 years & below 40 years.

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

Opinion:-

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

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

Sd/-	Sd/-	Sd/-
(Dr. L. Raichandani)	(Dr. A.L.Chauhan)	(Dr. P.C. Vyas)
Professor, Anatomy	PHOD, Radiodiagnosis	PHOD, forensic Medicine
Dr. S.N. Medical College	Dr. S.N. Medical College	Dr. S.N. Medical College
Jodhpur	Jodhpur	Jodhpur”

13. It is evident from the opinion tendered by the Board that the appellant's age has been placed in the range of 30 to 36 years. The Board appears to have taken the average of two extremitees and concluded that the appellant's age on the date of the examination was about 33 years. It was on the basis of this estimate that Mr. Panjwani contended that the appellant should have been around 14 years, 2 months and 7 days old if his age was 30 years on the date of

medical examination. He should have been 17 years, 2 months and 7 days old on the date of the occurrence if his age is taken as 33 years and 20 years, 2 months and 7 days if his age is taken as 36 years on the date of the medical examination. It was argued that even if one were to accept the average of the two estimates in the range of 30-36 years, mentioned by the Medical Board, he was a juvenile on the date of the occurrence being only 17 years, 2 months hence entitled to the benefit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

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

> *"12. **Procedure to be followed in determination of Age**.—*
>
> *(1) xxxxxxxxxxxxxxx*

(2) xxxxxxxxxxxxxxx

(3)

(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"

15. The medical opinion given by the duly constituted Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine has determined his age to be "about" 33 years on the date of the examination. The Board has not been able to give the exact age of the appellant on medical examination no matter advances made in that field. That being so in terms of Rule 12 (3) (b) the appellant may even be entitled to benefit of fixing his age on the lower side within a margin of one year in case the Court considers it necessary to do so in the facts and circumstances of the case. The need for any such statutory concession may not

however arise because even if the estimated age as determined by the Medical Board is taken as the correct/true age of the appellant he was just about 17 years and 2 months old on the date of the occurrence and thus a juvenile within the meaning of that expression as used in the Act aforementioned. Having said that we cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. We are not sure whether that is the correct way of estimating the age of the appellant. What reassures us about the estimate of age is the fact that the same is determined by a Medical Board comprising Professors of Anatomy, Radiodiagnosis and Forensic Medicine whose opinion must get the respect it deserves. That apart even if the age of the appellant was determined by the upper extremity limit i.e. 36 years the same would have been subject to variation of

plus minus 2 years meaning thereby that he could as well be 34 years on the date of the examination. Taking his age as 34 years on the date of the examination he would have been 18 years, 2 months and 7 days on the date of the occurrence but such an estimate would be only an estimate and the appellant may be entitled to additional benefit of one year in terms of lowering his age by one year in terms of Rule 12 (3) (b) (supra) which would then bring him to be 17 years and 2 months old, therefore, a juvenile.

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

17. In the result, this appeal succeeds but only in part and to the extent that while the conviction of the appellant for

offences under Section 302 and 376 of IPC is affirmed the sentence awarded to him shall stand set aside with a direction that the appellant shall be set free from prison unless required in connection with any other case.

…………………………………….J
(T.S. THAKUR)

…………………………………….J
(R. BANUMATHI)

New Delhi,
January 8, 2015

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॥ यतो धर्मस्ततो जयः ॥
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