that the learned trial Judge has committed a grave error in convicting the appellant accused for the offence in question as the prosecution has failed to prove the same beyond reasonable doubt. Moreover, the learned Additional Public Prosecutor is not in a position to take otherwise view of the matter by showing any substantive and cogent evidence. Accordingly, the present appeal deserves to be allowed and the impugned judgment and order is required to be set aside.

6. In view of the aforesaid discussion, present appeal succeeds and the impugned judgment and order dated 05/01/2011, passed by the learned Special Judge (Electricity), Mahesana in Special Electricity Case No. 9 of 2010, is hereby set aside and the appellant - accused is acquitted of the charge for which he is convicted and sentenced by giving benefit of doubt. The appellant - accused is reported to be on bail and accordingly, he needs not to surrender to custody except he requires so in any other offence and his bail bond shall stand cancelled. Registry to return the R&P to the trial Court forthwith.

***Result*:-** Appeal allowed.

ABC 2016 (II) 451 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT

(G.B. Shah, J.)

Criminal Appeal (Against Conviction) No. 1116 of 2014
Decided on 12 September, 2016

AMARSINH KALUSINH SOLANKI ***- Appellant(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered*:-** ***(A) Indian Penal Code, 1860 — Sections 363, 366 & 376— Offence under —Allegation that the victim was taken to different places including temple against her will— Held, the victim ought to have raised alarm when she had enough opportunities — did not do so— Age of prosecutrix — contradiction regarding — Held, conviction cannot be based solely relying on the unreliable and unworthy testimonies of the witnesses and questionable documents regarding age of the victim — Acquittal. (Para 10 & 11)

(B) Indian Evidence Act, 1872 — Section 3 — Relevant fact— Determination of Age —Thumb impression —not identified by proper

endorsement as required under the law — Held, it is not clear as to who has given said thumb impression against the entry —cannot be relied upon. (Para 9)

(C) Indian Evidence Act, 1872 — Section 3 — Relevant fact— Determination of Age — School leaving certificate — non-production of — Certificate issued by the concerned Gram Panchayat was produced on record — School leaving certificate though available but not produced — Fatal to prosecution. (Para 9)

Facts:- *A complaint was filed against the accused alleging inter alia that she and her daughter aged about 17 years and 4 months went to the field. She went to some place but did not return and therefore, a missing complaint was filed before the Police. Upon inquiry, it was informed by her sister-in-law that her daughter was taken to Hospital by the accused due to illness and when the complainant, her husband and sister-in-law went to the hospital, her daughter told that she was forcefully taken by the accused for the purpose of marrying against her will. In pursuance of the said complaint, investigation started and charge sheet was filed. The accused was convicted u/ss 363, 366 and 376 of IPC, giving rise to the present appeal. The honourable Gujarat High Court found that the prosecution has not proved its case beyond reasonable doubt. Conviction was set aside.*

Law of relief:- Conviction cannot be based solely relying on the unreliable and unworthy testimonies of the witnesses and questionable documents regarding age of the victim.

Held:- It appears from the original Birth and Death Register produced before the Court by the learned APP that thumb impression was made against entry No.194 on page No.14. However, said entry was not identified by proper endorsement as required under the law and therefore, it is not clear as to who has given said thumb impression against the entry recording birth date of the victim and therefore, it cannot be relied upon for determining the age of the victim. Moreover, it has been admitted by complainant-P.W.No.1-Manjulaben and mother of the victim in para 5 of her cross-examination that School Leaving Certificate was obtained by Janakben. It further appears that in the School Leaving Certificate issued by Principal of the School, Raghunathsinh Solanki, year 1993 has been corrected to read as 1994. P.W.No.20-Shendhaji Varvaji Vaghela, P.S.I., who investigated the case has stated in his cross examination at Exh.72 that he does not know as to whether the year mentioned in the School Leaving Certificate collected by him was

corrected to read as 1994 in place of 1993. However, said school leaving certificate has not been produced on record but only birth certificate issued by the concerned Gram Panchayat has been produced on record. In view of the above, a doubt is created in the mind of this Court as to the actual date of birth of the victim appearing on the record and therefore, it would be advisable to refer and take assistance from the medical evidence forthcoming on the record. (Para 9)

Apart from the above, it is clear from the evidence of the complainant and the victim that everything in their house takes place as per the wish of Janakben, who is serving in the police department. It appears that various contradictions have come out in the depositions of the complainant, victim and paternal aunt of the victim, which have not been taken care by the trial court. It is also evident from the record that Janakben did not like the appellant marrying the victim and therefore, it appears that a false story has been concocted by Janakben against the appellant to keep the appellant away from the victim and she succeeded in the same by marrying the victim with some other person. It further appears from the evidence of Janakben that the victim was taken to different places against her will. If that is the case, then the victim ought to have raised alarm when she had enough opportunities at the time when she visited with the appellant at many places including the temple, however, the victim did not do so. (Para 10)

In view of the above, this Court is of the opinion that conviction cannot be based solely relying on the unreliable and unworthy testimonies of the witnesses and questionable documents regarding age of the victim. Thus, a doubt is created in the mind of this Court as to actual involvement of the accused in the offence in question and hence, benefit of doubt is required to be given to him. (Para 11)

Counsel:- ***For Appellant(s):*** *HCLS Committee & Mr. P.V. Patadiya, Advocate.*

For Respondent(s): *Mr. K.L. Pandya.*

Cases Referred:-

1. *Madhya Pradesh v. Anoop Singh reported in AIR 2015 SC (Supp) 1819. (Para 9)*
2. *Mahadeo S/o Kerba Maske v. State of Maharashtra and Anr. (2013) 14 SCC 637. (Para 9)*

October 2016

JUDGMENT

G.B. SHAH, J.: - 1. This appeal has been preferred against the judgment and order dated 15.7.2014 passed by the learned Additional Sessions Judge, Nadiad, Sessions Case No.30 of 2012 whereby original accused was convicted and sentenced to undergo RI for five years and to pay fine of Rs.1,000/-, in default, to undergo further RI for six months for the offence punishable under sections 363 of Indian Penal code ('IPC' for short), RI for five years and to pay fine of Rs.1,000/-, in default, to undergo further RI for six months for the offence punishable under sections 366 of IPC and RI for seven years and to pay fine of Rs.3,000/-, in default, to undergo further RI for six months for the offence punishable under sections 376 of IPC. All the sentences were ordered to run concurrently. He was given set off for the period undergone in jail.

2. Short facts of the case of the prosecution are that a complaint came to be filed by the complainant- Manjulaben Ramchandra Aanopsinh Solanki on 26.1.2012 against the accused before Chaklasi Police Station being I.C.R.No.13 of 2012 alleging inter alia that on 4.11.2011 she and her daughter aged about 17 years and 4 months went to the field. At about 3.00 p.m., her daughter went to Talavdi and thereafter she did not return and therefore, a missing complaint was filed on 9.11.2011 before Chaklasi Police Station. Upon inquiry, it was informed by her sister-in-law that her daughter is taken to Karamsad Hospital by one Amarsinh Kalusinh Solanki of her Village due to illness and on 21.1.2012 when she, her husband and sister-in-law went to the hospital, it was informed by her daughter that she was forcefully taken by the accused for the purpose of marrying against her will. In pursuance of the said complaint, investigation started and as there appeared prima facie case against the accused, a charge sheet was filed against him. Thereafter, charge was framed against the accused. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. 2.1 To prove the guilt against the accused, prosecution examined as many as 24 witnesses. The prosecution also relied on several documentary evidence numbering 27. After filing of closing pursis by the prosecution, further statement of accused under Sec.313 of Cr.P.C. was recorded.

2.2 On conclusion of trial and upon hearing the learned advocates appearing for the respective parties, impugned judgment

and order as aforesaid in the earlier part of this judgment was delivered giving rise to the present appeal.

3. Heard learned advocate, Mr. P.V.Patadiya for the appellant-original accused and Mr. K.L. Pandya, for the respondent-State.

4. Mr. P.V.Patadiya, learned advocate for the appellant-original accused, drawing attention of this Court on the deposition of P.W.No.2-victim at Exh.13, submitted that she has admitted in her cross- examination that she was taken by the accused to different places including a temple. The victim has also admitted that neither she nor her mother had gone to the police station but the procedure after her admission to Karamsad Hospital was done by Janakben, who is the paternal aunt of the victim. Taking this Court through the deposition of the complainant- P.W.No.1-Manjulaben Ramchandra Solanki, mother of the victim recorded at Exh.11, he submitted that the complainant has deposed that Janakben, who is the maternal aunt of the victim, serving in police department used to dominate their family and she did not want to marry the victim with Amarsinh. She has further admitted that it is P.W.No.3-Janakben who played major role in filing the complaint against the present appellant-accused and in the remarriage of the victim. She has further admitted that Janakben brought leaving certificate from the school in which, Principal, Rughnathsinh Solanki managed to substitute the birth year as 1994 in place of 1993 and therefore, considering the evidence of the complainant and the victim, it appears that case against the appellant- accused has not been proved by the prosecution beyond reasonable doubt, however, the trial court has convicted the appellant-accused based on the evidence of P.W.No.3-Janakben Mohansinh Solanki-Exh.14, who is paternal aunt of the victim and medical papers. According to him, age of the victim as stated in the case paper is 19 years and as per the complainant and victim, the victim is above 18 years at the time of incident and the victim went with the appellant on her own free will as she was in love with the appellant and they had physical relation as husband and wife. He further submitted that when the medical evidence and the evidence of the complainant and the victim did not support the case of the prosecution, the trial court ought not to have convicted the appellant-accused. He, therefore, sought to allow this appeal by quashing and setting aside the impugned judgment and order of conviction and sentence.

5. Learned APP, Mr. K.L.Pandya, took this Court through the depositions of complainant-P.W.No.1- Manjulaben Ramchandra Solanki at Exh.11, P.W.No.2- victim at Exh.13 and paternal aunt of the victim- P.W.No.3-Janakben at Exh.14 and medical evidence and submitted that age of the victim was below 18 years at the time of incident as per the medical papers and therefore, consent is not valid in the eye of law. He further submitted that the learned trial Judge has properly appreciated oral as well as documentary evidence produced on record and has rightly held that the prosecution has successfully proved the case against the accused beyond reasonable doubt and therefore, has rightly convicted the accused for the offences charged against him and therefore, he urged to dismiss the appeal by confirming the impugned judgment and order.

6. This Court has considered the above referred rival submissions made by the learned advocates for the respective parties together with the impugned judgment and order.

7. The first and foremost aspect which needs to be considered in the present appeal is the age of the victim. There is no clarity forthcoming from the record of the case regarding the exact age of the victim and therefore, on this aspect, this Court is unable to concur with the view taken by the trial court as the finding reached by the trial court is based on questionable evidence.

8. It appears that, regarding age of the victim, the trial court has mainly relied on the birth certificate produced on record at Exh.36 showing her date of birth as 24.11.1994. The trial court has also relied on the deposition of P.W.No.7-Sanjiv Mansingrav Mohite, Talatai-cum-Mantri, Village-Bhoj, Taluka Padra, Dist. Baroda, who has produced xerox copy of the Birth and Death Register for the year 1994 -1995 wherein on page No.14 at Sr.No.194, entry No.194 was recorded showing birth of the victim as 24.11.1994, which is at Mark 5/12 below Exh.36. The trial court has further relied on the evidence of P.W.No.1-Manjulaben-complainant and mother of the victim at Exh.10, P.W.No.2-victim at Exh.13 and P.W.No.3-Janakben Mohansinh Solanki, paternal aunt of the victim at Exh.14 deposing the date of birth of victim as 24.11.1994. The trial court has also relied on the evidence of P.W.No.18-Manubhai Chhotabhai Vaghela at Exh.62, ASI, who recorded the complaint, deposing that during the course of investigation, he has collected the birth certificate of the victim. Considering all these oral and documentary evidence, the trial

court has come to the conclusion that date of birth of the victim was 24.11.1994 and hence, the victim was below the age of 18 and minor on the date of incident. Said finding arrived at by the trial court is erroneous in view of the serious lapses noticed in the birth certificate and school leaving certificate produced on record.

9. It appears from the original Birth and Death Register produced before the Court by the learned APP that thumb impression was made against entry No.194 on page No.14. However, said entry was not identified by proper endorsement as required under the law and therefore, it is not clear as to who has given said thumb impression against the entry recording birth date of the victim and therefore, it cannot be relied upon for determining the age of the victim. Moreover, it has been admitted by complainant-P.W.No.1-Manjulaben and mother of the victim in para 5 of her cross-examination that School Leaving Certificate was obtained by Janakben. It further appears that in the School Leaving Certificate issued by Principal of the School, Raghunathsinh Solanki, year 1993 has been corrected to read as 1994. P.W.No.20-Shendhaji Varvaji Vaghela, P.S.I., who investigated the case has stated in his cross examination at Exh.72 that he does not know as to whether the year mentioned in the School Leaving Certificate collected by him was corrected to read as 1994 in place of 1993. However, said school leaving certificate has not been produced on record but only birth certificate issued by the concerned Gram Panchayat has been produced on record. In view of the above, a doubt is created in the mind of this Court as to the actual date of birth of the victim appearing on the record and therefore, it would be advisable to refer and take assistance from the medical evidence forthcoming on the record. In this connection, it has been held by the Hon'ble Supreme Court in the case of State of ***Madhya Pradesh v. Anoop Singh reported in AIR 2015 SC (Supp) 1819*** from paragraph Nos.10 to 13 as under:

> "10. We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix.
>
> 11. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident. The prosecution in support of their case adduced two certificates, which were the birth certificate and the middle school certificate. The date of birth of the prosecutrix has been

shown as 29.08.1987 in the Birth Certificate (Ext. P/5), while the date of birth is shown as 27.08.1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the abovementioned Exhibits. The Trial Court has rightly observed that the birth certificate Ext. P/5 clearly shows that the registration regarding the birth was made on 30.10.1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under-aged in view of the possibility of the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix.

12. This Court in the case of ***Mahadeo S/o Kerba Maske v. State of Maharashtra and Anr. (2013) 14 SCC 637***, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"Rule 12(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."

13.This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under:

"Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to

(iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."

(Emphasis supplied)"

9. It is clear from the aforesaid settled law that in absence of alternative methods described under Rule 12(3)(a)(i) to (iii) above, opinion of medical expert can be sought for and relied upon. In the present case, in view of the doubt created in the mind of this Court regarding credibility of the date of birth mentioned in the Birth Certificate and School Leaving Certificate produced on record, they cannot be relied upon for ascertaining the age of the victim for basing conviction of the accused. Therefore, it would be advisable to take assistance of radiological report produced on record at Exh.26 to ascertain the approximate age of the victim. A perusal of the radiological report produced on record at Exh.26 on running page 177 issued by the Assistant Professor, Department of Radiology, B.J.Medical College & Civil Hospital, Ahmedabad, mentions age of the victim to be more than 17 years but less or equal to 19 years. In view of the aforesaid, it can be said that age of the victim was above 17 years i.e. 17+ years of age but below 19 years at the time of incident. Thus, in view of the principle laid down by the Hon'ble Supreme Court in the case of Anoop Singh(supra), it is proved that the victim was above 17 years but below 19 years of age at the time of incident.

10. Apart from the above, it is clear from the evidence of the complainant and the victim that everything in their house takes place as per the wish of Janakben, who is serving in the police department. It appears that various contradictions have come out in the depositions of the complainant, victim and paternal aunt of the victim, which have not been taken care by the trial court. It is also evident from the record that Janakben did not like the appellant marrying the victim and therefore, it appears that a false story has been concocted by Janakben against the appellant to keep the appellant away from the victim and she succeeded in the same by marrying the victim with some other person. It further appears from the evidence of Janakben that the victim was taken to different places against her will. If that is the case, then the victim ought to have raised alarm when she had enough opportunities at the time when she visited with the appellant at many places including the temple, however, the victim did not do so.

11. In view of the above, this Court is of the opinion that conviction cannot be based solely relying on the unreliable and unworthy testimonies of the witnesses and questionable documents regarding age of the victim. Thus, a doubt is created in the mind of this Court as to actual involvement of the accused in the offence in question and hence, benefit of doubt is required to be given to him. It appears that the trial court, in the impugned judgment and order, did not consider all these aspects and came to the conclusion that the prosecution has proved the case against the appellant-original accused beyond reasonable doubt and accordingly, passed the impugned judgment and order of conviction and sentence to which, in view of the above discussion and taking into consideration facts and circumstances of the case coupled with other evidence discussed herein above, can be said to be not proving the guilt against accused beyond reasonable doubt and therefore, conviction and sentence recorded by the trial court on accused was unjust and improper.

12. In view of the above, Criminal Appeal is allowed. Conviction and sentence imposed on the accused vide judgment and order of conviction and sentence dated 15.7.2014 passed by the learned Additional Sessions Judge, Nadiad, Sessions Case No.30 of 2012 is hereby quashed and set aside and the accused is acquitted of the charges levelled against him by giving benefit of doubt. He is on temporary bail for a period upto 14th September, 2016. His bail bond shall stand cancelled. He is not required to surrender to judicial

custody and is ordered to be set at liberty forthwith, if not required in any other offence. However, fine paid by the accused shall not be refunded. Records and proceedings shall be sent back to the courts below forthwith.

Result:- Criminal Appeal allowed.
