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IN THE HIGH COURT OF JUDICATURE AT: JABALPUR (M.P.)

CRIMINAL APPEAL NO. 2383 of 1998.

APPELLANT :
(IN JAIL)

CHANDRIKA KUMAR RAJAK
S/o Dhan Sai, Age-19 years,
R/o Village-Junapara, P.S.-Patna
Distt. Sarguja (Now Korea) M.P.

VERSUS

RESPONDENT:

The State of Madhya Pradesh
through-P.S.-Patna, Distt. Sarguja
(Now Korea) M.P.

Criminal Appeal u/s 374 (2) of the Code of Criminal
Procedure : 1973.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 2383 of 1998

Appellant : Chandrika Kumar Rajak

VERSUS

Respondent : The State of Madhya Pradesh
(Now C.G.)

CRIMINAL APPEAL U/S. 374 (2) OF CRIMINAL PROCEDURE CODE

SB: Hon'ble Shri Goutam Bhaduri, J.

Present: Shri Shakti Raj Sinha, Advocate for the appellant.
Shri Gary Mukhopadhyay, Panel Lawyer for the State.

JUDGMENT

(Passed on 01st day of January, 2014)

1. This is an appeal against the judgment dated 08.09.1998 passed by the Additional Sessions Judge, Baikunthpur, in S.T. No.70/1998 whereby the appellant has been convicted under Section 363, 366 & 376 (1) of IPC and has been sentenced for 3 years R.I. under Section 363 of IPC and a fine of Rs.500/- and in absence of payment of fine, additional 6 months R.I. was ordered for and has further been sentenced to 3 years R.I. under Section 366 of IPC and fine of Rs. 500/- and in absence of payment of fine, additional 6 months R.I. was ordered for and lastly the appellant has been sentenced to 7 years R.I. under Section 376(1) of IPC and fine of Rs.1000/- and in absence of payment of fine, additional 1 year R.I. was ordered for.
2. The brief facts of the prosecution case is that the prosecutrix was residing with her mother and father at village Patna and was studying at Class-8th. The accused also used to visit the neighbour-hood of the prosecutrix and was engaged as a news paper vendor. On 15.11.1997, according to the prosecution, the prosecutrix, who was aged about 13 years, was allured by the accused as such eloped with the accused in the night. It is the case



of the prosecution that the prosecutrix was allured on the pretext of marriage by the accused. After having ran away with the accused, the prosecutrix was subjected to rape, which she did not disclose to any one and ultimately on 22.11.1997, the prosecutrix was left at one place named Katora, wherefrom she came back to her house. On the report having been made, crime was investigated and charge sheet was filed. During the course of trial, the accused denied the charges and claimed to be tried. During the course of trial, the prosecution had examined as many as 19 witnesses and the learned Court below after conclusion of trial and evaluating the evidence came to a finding that the appellant accused has committed crime and thereby convicted him as aforesaid. Hence this appeal.

3. I have heard the learned counsel for the parties at length and examined the records.
4. The learned counsel for the appellant submits that the prosecution has failed to prove the age of the prosecutrix to be the minor. It is submitted that the prosecution has examined the Headmaster of the School as PW-13, who has proved the mark sheet of the prosecutrix wherein the age of the prosecutrix was written as 27.05.1984. It is further submitted that though the date of birth of prosecutrix was shown in the mark sheet Ex.P-1 was on the basis of the admission register, but the admission register itself has not been placed and proved in this case. He further submits that the evidence of the Headmaster cannot be taken into account, as he was not author of the document. He has further submitted that the father of the prosecutrix has not been examined and one Bechu Singh (PW-1) who was examined though has said that the prosecutrix was her daughter but actually he was not the father of the prosecutrix and therefore, the statement of such witness whereby the date of birth has been disclosed cannot be accepted. He further referred to the statement

of the prosecutrix (PW-2) and went through the entire statement and submits that the prosecutrix remained with the accused from 15.11.1997 to 21.11.1997 and no resistance was made, therefore, this cannot be said that the prosecutrix was forcefully taken away from the lawful guardianship of her mother and father. He also referred to the statement of Santosh Kumar (PW-4), who has stated that when he saw the prosecutrix and the accused and tried to suggest them to go back, he was asked to leave the place, thereby the inference which could have been drawn that the prosecutrix was a consenting party to the entire incident. He further submits that the Doctor who was examined as PW-8 though has suggested to ascertain the age of the prosecutrix and referred for Radiology test, despite that the prosecution has not conducted such examination of prosecutrix and therefore the benefit of doubt was given to hold that the prosecutrix was major on the date of incident. He therefore submits that the entire finding arrived at by the learned Court below is bad, which cannot be sustained.

5. *Per contra*, the learned State counsel submits that the prosecutrix was a minor on the date of incident and she was enticed by the accused on the pretext of marriage and rape was committed on her. It is further submission of the State that the date of birth of the prosecutrix which is shown to be 27.05.1984 cannot be doubted since it was disclosed by the family members of the prosecutrix. He therefore submits that according to Ex.P-1, the date of birth of the prosecutrix, if is counted, she happened to be minor on the date of incident and therefore submitted that the order of the learned Court below is well merited, which cannot be interfered.
6. I have examined the entire evidence on record. In order to ascertain the age of the prosecutrix, the prosecution has examined Ram Byas Pandey as PW-13, who was the Headmaster of the School wherein the prosecutrix was studying. He has stated that he was working in the School as a

Headmaster and had brought the entry register. He has further proved the mark sheet of the prosecutrix, which is marked as Ex.P-1, wherein the date of birth of the prosecutrix is shown to be 27.05.1994. The witness has stated that the date of birth in the mark sheet is recorded on the basis of the register maintained in the school.

7. The prosecution has examined the father of the prosecutrix as PW-1. He has stated that the date of birth of the prosecutrix is 27.05.1994 for which he had a school certificate, which is marked as Ex.P-1. The witness has further stated that he has recorded the age of the prosecutrix in the School.
8. One witness, Mohd. Ishaq Siddiqui, who has been examined as PW-10, has also stated that the age of the prosecutrix was 13-14 years and it was disclosed to him that the accused had enticed the prosecutrix and committed rape on the pretext of marriage. This witness in the cross-examination has said that the prosecutrix is the daughter of the younger brother of Bechu Singh, who was examined as PW-1. He has further stated that the father of the prosecutrix stays at U.P. and Bechu Singh (PW-1) did not have any child for which he had kept the daughter of his brother with him.
9. The Headmaster, who had been examined as PW-13, has proved the mark sheet, wherein the date of birth is registered, in the cross-examination, has said that whatever the date are being said by the parents at the time of admission that is being recorded in the register and no separate certificate is called for and on such submission the date of birth is recorded in register and the register were being countersigned by the guardian of the student. He has further stated in the cross-examination that he had brought the register with him, but it was not filled up in his presence. The said register has not been proved in the case.

10. The Doctor in this case was examined as PW-8. She had stated that she has examined the prosecutrix. On examination, the Doctor had opined that the prosecutrix was a healthy girl and on examination, no injury was found. On examination, the Doctor had further gave her report by Ex.P-6 wherein neither any internal nor any external injury was detected. However, on examination of private parts, it was reported that hymen was absent and two fingers could have been easily inserted in the vagina. She has further stated that, during the examination, she came to an opinion that no forceful rape was committed on her. In order to ascertain the age, the Doctor had referred the prosecutrix for radiological test for age confirmation. In the cross examination, the Doctor has stated that the age which was shown by her that of 13 ½ years was not on the basis of any paper but only shown on presumption.
11. The prosecution in this case has not produced the register where the age of the prosecutrix was recorded on the basis of which, the age was recorded in the mark sheet Ex.P-1. The Headmaster of the School (PW-13) had stated during the examination and cross-examination that he had brought the register, but such register has not been placed by the prosecution in the evidence. The witness has also ascertained that when the date of birth is recorded then it is countersigned by the parents of the student. The prosecution and its witness though had brought the register, but it was not placed before the Court during the course of evidence or by way of additional evidence.
12. The PW-1, Bechu Singh, who is claimed to be the father of the prosecutrix is not the natural guardian/father of the prosecutrix, which is revealed from the statement of the PW-10, wherein it is stated that the prosecutrix is not the daughter of Bechu Singh (PW-1) but she is actually the daughter of the younger brother of Bechu Singh. The prosecution in this case despite the suggestion made by the Doctor has not placed on record any radiological

expert medical report. The prosecutrix was neither referred to the Dental Surgeon or to the Radiologist or both these opinions may be withheld from the Court. The Doctor in this case after the examination had referred the prosecutrix for Radiological test but the same whether was performed or not is not clear, which casts a suspicion on the prosecution version.

13. For determining the date of birth, only fact is available is Ex.P-1 i.e. the mark sheet. According to the statement of the witnesses, the said mark sheet is not the primary document, but the recording of the date of birth in such mark sheet was made on the basis of the date of birth register. The witness PW-13, who has proved the Ex.P-1 is not the person who made the entry. He has clearly stated that the date of birth is recorded on the basis of a register, which is countersigned by the parents when a student is admitted to the School. The evidence has come on record that PW-1 is not the actual father of the prosecutrix. Furthermore, who made the entry or who gave the date of birth to record it in the register is not clear. The suspicion looms large for the fact that despite the register was alive and available on the basis of which the date of birth was recorded, it was not placed before the Court so as to prove the entry by whom it was made or by whom it was countersigned. It was suppressed by the prosecution. So the fact is not clear that the entry made in the Ex.P-1 on the basis of a register, how it was registered and on what basis the date of birth was recorded.

14. The Hon'ble Supreme Court in *Alamelu & Another v. State represented by Inspector of Police*¹ has held as under :

"42. Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi v. Anand Purohit* (1988 Supp SCC 604) observed as follows : (SCC pp. 618-19, para 14)

¹(2011) 2 SCC 385

"14. The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Merely because the documents Exts. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of the date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Humki Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in *Narbada Devi Gupta v. Birendra Jaisawal* [(2003) 8 SCC 745] where this Court observed as follows : (SCC p. 751, para 16)

"16. The legal position is not in dispute that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'."

15. So applying such principle in the set of evidence of the given case, I am of the opinion that the aforesaid burden of proof has not been discharged by the prosecution, therefore, the entry of the date of birth on the basis of the mark sheet cannot be solely relied upon to definitely fixed the age of the prosecutrix.
16. Now considering the statement of the prosecutrix, who has been examined as PW-2, she had stated that on 15.11.1997, the accused came to his house and asked her to accompany. Thereafter, they traveled from their place of village Patna to Charcha Station. Thereafter, they went to Manendragarh and then from Manendragarh, they came to Bilaspur and from Bilaspur, she went to Kotaliya and stays there to some relation's place for two days. She further stated that the accused has committed rape on her and she further states that from Kotaliya they came back to a place Sirauli. Thereafter, she was left by the mother and aunt of the accused and was handed over to the parents of the prosecutrix. She in the cross examination has stated that while they were traveling, she had not raised any alarm or even when she saw certain persons whom she knew, she did not raise any alarm or ask for any help to rescue.
17. The other witness Santosh Kumar who was examined by the prosecution as PW-4 has stated that when he went to a place Charcha, at that time, he met the prosecutrix along with the accused. The witness has further stated that when he suggested the accused and the prosecutrix to go back to home, he was told to go away from that place otherwise he will be assaulted. The Doctor in his report has stated that the prosecutrix did not have any internal or external injury on her body.
18. Taking all the statement together, this fact comes to fore that the prosecutrix voluntarily accompanied with the accused from place to place

and the fact that forceful rape was committed on her do not inspire confidence.

19. Taking the entire totality of the evidence and on a close scrutiny of evidence, I am of the considered view that the prosecution has failed to prove and discharge its duties to prove that the prosecutrix was minor on the date of incident and forceful rape was committed on her by taking her away from the legal guardianship of her parents.
20. In view of the foregoing discussion, the judgment and order of conviction passed by the learned Court below is set aside. Accordingly, the appeal is allowed.
21. If the appellant is on bail, his bail bond shall continue for a period of six months from today.

Sd/-
Goutam Bhaduri
Judge