

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 449 of 2002

1. Jamadar @ Jhadu S/o Sombaru, Caste – Ganda, aged 20 years, R/o Islamnagar Supela, Odiya Mohalla.
2. Suresh alias Andakhau S/o Banwasi, Caste Ganda, aged 22 years, R/o Balbag, P.S. Distt. Bhawanipatnam, Present address – Islam Nagar, Udiya Mohalla, Supela.
3. Smt. Padma W/o Suresh, Caste Ganda, aged 20 years, R/o Balbag Orissa, Present Address – Islam Nagar, Odiya Mohalla, Supela.

---- Appellants

Versus

1. State Of Chhattisgarh through – District Magistrate, Durg.

---- Respondent

For Appellants – Ms. Laxmin Tondey, Advocate.

For Respondent – Mr. U.K.S.Chandel, Panel Lawyer.

Hon'ble Shri Justice Chandra Bhushan Bajpai

Order On Board

31/03/2015

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 10-04-2002 passed by the First Additional Sessions Judge, Durg, C.G. in Sessions Trial No.166/2000 whereby and whereby the learned trial Court after holding appellant Jamadar @ Jhadu (A-1) guilty under Sections 363, 366 and 376 of the Indian Penal Code (in short 'the IPC') and appellants Suresh @ Andakhau (A-2) and Smt. Padma (A-3) guilty under Sections

363/34, 366/34, 376/34 of the IPC for kidnapping the prosecutrix (PW-4)(name not mentioned) from lawful guardianship, inducing her to compel for illicit intercourse and for committing rape against her will and consent, sentenced them to undergo rigorous imprisonment for 3 years, 7 years and 7 years, and to pay fine of Rs.500/-, Rs.500/- and Rs.500/-, in default of payment of fine, to further undergo R.I. for 3 months, 3 months and 3 months with a direction to run all the substantive jail sentences concurrently.

2. Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.

3. As per the case of prosecution, on 15-01-2001, at about 07.05 p.m., uncle of the prosecutrix (PW-4) namely Kalim (PW-2) gave a written complaint to Police Station Supela. As per written complaint (Ex.-P/3), uncle of the prosecutrix (PW-4) informed police that on 14-01-2001, he had lodged the report for missing of his niece. On 13-01-2001 about 2.30 p.m. he had received information that her niece was kidnapped by appellant Jamadar @ Jhadu (A-1) and for this act appellant Suresh @ Andakhau (A-2) helped him. Police registered the First Information Report (Ex.-P/4) under Sections 363/34 and 366/34 of the IPC on the basis of the written complaint (Ex.-P/3) against appellant Jamadar @ Jhadu (A-1) and appellant Suresh @ Andakhau (A-2) and started investigation. On 14-02-2001, the prosecutrix along with the appellants and mother of appellant Jamadar @ Jhadu (A-1) and Suresh @ Andakhau (A-2) reached police station. She was given in the custody of his father Sheikh Anwar (PW-9) by Supurdnama (Ex.-P/12). During further investigation, after obtaining necessary consent and permission from the parents and Executive Magistrate vide Ex.-P/13 and Ex.-P/14, the prosecutrix (PW-4) was sent for medical examination. Doctor Ms.S.Roy (PW-1), after examination, noticed no external or internal injury. She took the vaginal swab

and pubic hair for making slide and after sealing it handed over to the concerned Constable. The doctor noticed hymen absent, vagina admits 2 fingers easily. She assessed age of the girl between 14 to 18. No opinion regarding recent intercourse was possible. The Doctor gave her report vide Ex.-P/1. She also examined clothes of the prosecutrix including two yellowish stain and advised for the chemical analysis vide report Ex.-P/2. The statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'). All the appellants including co-accused Opin were duly arrested. Appellant Jamadar @ Jhadu (A-1) was sent for medical examination. Doctor K.Gopinath (PW-12) examined appellant Jamadar @ Jhadu (A-1) and opined that he was capable of doing intercourse and gave his report vide Ex.-P/15A. He also examined the underwear and encircled alleged stain of semen and after sealing the undergarment advised for chemical analysis by giving his report Ex.-P/16A. As per advice of Doctor Ms. S.Roy (PW-1) regarding radiological examination for assessment of age, police sent the prosecutrix for ossification test. Doctor G.S.Thakur (PW-11) after conducting the necessary X-ray examination opined the age of the prosecutrix as 15 years and gave his report Ex.-P/23. The primary school certificate of the prosecutrix was seized by the Investigating Officer during the investigation from Sheikh Anwar (PW-9). The said certificate is admitted in the evidence as Ex.-P/7A. during the investigation, the Investigating Officer also collected the evidence regarding entries in the school register Ex.-P/11A. As per the entries, the date of birth of the prosecutrix was 05-09-85. The articles seized were sent for chemical analysis vide Ex.-P/24 which confirmed the presence of stain of semen over the undergarment seized from appellant Jamadar @ Jhadu (A-1) and also in the undergarment seized from the prosecutrix, slide prepared by the Doctor. The Forensic Science Laboratory not confirmed human spermatozoa in the pubic hair, human spermatozoa noticed in the undergarment of the prosecutrix, in the undergarment of appellant Jamadar @

Jhadu (A-1) and in the slide.

4. After completion of the investigation, charge sheet before the Chief Judicial Magistrate, Durg on 29-03-2001, who, in turn, committed the case to the Court of Sessions, Durg, the learned Additional Sessions Judge received the case on transfer and conducted the trial. During the trial, charges were framed against all the appellants and one co-accused Opin for the offence under Section 363, 366 and 376 of the IPC for the appellant Jamadar @ Jhadu (A-1) and under Sections 363/34, 366/34 and 376/34 of the IPC against the other appellants and co-accused Opin.

5. In order to prove guilt of the appellants, the prosecution examined as many as 12 witnesses. The statements of the accused were recorded under Section 313 of the Code wherein they denied the circumstances appearing against them and pleaded innocence and false implication in crime in question.

6. After providing opportunity of hearing to the parties, the learned First Additional Sessions Judge acquitted co-accused Opin and convicted and sentenced the appellants as aforementioned.

7. I have heard learned counsel for the parties and perused the judgment impugned and record of the trial Court.

8. Learned counsel for the appellant submitted that in the present case age is core issue. As per ossification test and report Ex.-P/23 conducted by Doctor G.S.Thakur (PW-11), there may be difference of 2 to 3 years down and above. With this, at the time of incident the age of the prosecutrix may be held even at the age of 18 years. Doctor Ms. S.Roy (PW-1) opined on the basis of general appreciation that the prosecutrix was within the age group of 14 to 18. Ex.-P/7A, the certificate regarding primary school examination and Ex.-P/11 reveal that the date of birth of the prosecutrix was 05-09-85, but for the same Shaikh Anwar (PW-9), father of the prosecutrix from whom the Ex.-P/7A was seized, stated that he is illiterate person, he does not know the age of the prosecutrix

and since he was not educated, he recorded the age of the prosecutrix in the school by assumption. The learned counsel submitted that with the above evidence, Ex.-P/7 and Ex.-P/11A loses its importance. In-charge Head Master Gajendra Kumar (PW-8) who had proved the entries of the dakhil kharij register Ex.-P/11 admitted that there is no certification in the register, no seal of the school is over the register and at the time of admission in the school description used to be mentioned in the application and the basis on which the prosecutrix was admitted in the school was not produced and as per para 5 of the cross-examination of Gajendra Kumar (PW-8), when less educated or uneducated persons bring their ward for admission, they state the date of birth approximately and which was written in the register. The learned counsel further submitted that with the above mentioned piece of evidence, it is not proved beyond reasonable doubt that the prosecutrix was below the age of 18 at the time of the incident.

For the rest part of the incident, Ex.-D/2, police statement of the prosecutrix, is important as this is the first police statement given by the prosecutrix before the police. When we take comparative look from Ex.-D/2 and Court statement, it goes to show that the prosecutrix turned 360 degree and developed a story that some psychotropic drugs given to her and after taking it orally she was under the influence of intoxication and all 3 accused Jamadar @ Jhadu (A-1), Suresh @ Andakhau (A-2) and acquitted co-accused Opin had taken her to Titlagarh and she remained there for about a month and thereafter police people took her from Titlagarh to Supela police station and during the period, appellant Jamadar @ Jhadu (A-1) conducted sexual intercourse forcibly for 3 or 4 times, but this whole story is not in his police statement Ex.-D/2. As per Ex.-D/2, she was in love affair with appellant Jamadar @ Jhadu (A-1) and with her consent appellant Jamadar @ Jhadu (A-1) along with others had taken her to Titlagarh. While considering the entire Ex.-D/2, it is a case of consent. But before the Court she improved her version

on a different platform, hence, it would not be safe to convict the appellants for the same. The learned counsel further submitted that co-accused Opin was acquitted by the trial Court with the same set of evidence. The statement of the prosecutrix (PW-4) does not inspire confidence. She further add a point that as per the statement of Sub-Inspector U.R.Thakur (PW-10), the prosecutrix (PW-4), all the accused along with mother of appellant Jamadar @ Jhadu and appellant Suresh @ Andakhau (A-2) reached before Mohan Nagar police and from there they were taken to Supela police station, but on the other hand, as per the prosecutrix's statement, police people came at Titlagarh and they had taken the accused including the prosecutrix from Titlagarh to Supela. The learned counsel further submitted that in the present case, age is not proved that she was below the age of 18. It is a case of consent, she never attempted to run away from Titlagarh where she was taken and looking to the entire facts as she was a consenting party, the appeal may be allowed and the judgment of conviction and order of sentence awarded by the trial Court may be set aside.

9. Per contra, counsel appearing for the State/respondent opposed the argument advanced on behalf of the appellants and duly supported the judgment of conviction and order of sentence passed by the trial Court and submitted that the judgment of the trial Court is well founded. As per the evidence adduced, she was below the age of 16 at the time of the incident. There is no reason to disbelieve Ex.-P/7A, her certificate which was duly proved by the In-charge Head master of the school. Entries in the school register mention the date of birth of the prosecutrix as 05-09-85. Looking to her minority, she was not in a position to consent for her transportation as she was minor, it requires sanction from her parents regarding taking her to Titlagarh or any other place. Hence, there is no scope in the appeal and the same may be dismissed.

10. In order to appreciate the arguments advanced on behalf of the parties, I

have perused the evidence adduced by the prosecution.

11. Doctor Ms. S.Roy (PW-1) assessed the age of the prosecutrix 14 to 18 by physical appreciation. The same is not material, but it may be taken for consideration along with the other evidence. Radiologist G.S.Thakur (PW-11) assessed the age of the prosecutrix, after radiological examination, 15 years of age. He admitted in para 4 that there may be difference in the assessment of age for food and living, there may be difference to 2 to 3 years down and above, it goes to show that the prosecutrix may be held to be of the age of 18 years also. As per the settled law, whatever noticed in the favour of the accused, the same may be considered as this assessment is not exact assessment. On the other hand, Ex.-P/7A was seized from Sheikh Anwar, father of the prosecutrix, PW-9, who is illiterate, he is not stated anything regarding the date, month and year. He admitted that as he was illiterate, he had recorded the date of birth of the prosecutrix in the school only on assumption. If Sheikh Anwar (PW-9) is the maker of the recording of age of the prosecutrix, then with the above mentioned evidence, the same cannot be relied upon. Kotwari entries were not collected during the investigation, no reason was mentioned for the same. Najama (PW-6), mother of the prosecutrix, stated in the cross-examination, para 11, that her daughter elder to the prosecutrix is elder for 2 years and the age of her elder daughter is about 20 years, it goes to show that the prosecutrix may be at the age of 18 years at the time of the incident. Gajendra Singh (PW-8), In-charge Head Master duly proved the school entry register Ex.-P/11A; as per this register, the age of the prosecutrix was 05-09-85, but the contents appeared in the cross-examination of this witness at paras 3, 4 and 5, go to show that the basis on which the age was recorded in the school is not produced by the prosecution during the trial and if we combine this with the statement of father, Sheikh Anwar (PW-9) , it goes to show that the basis of entries regarding the date of birth of the prosecutrix was recorded only by assumption and the same may not be held

as conclusive and affirmative.

12. On close scrutiny, in the considered view of this Court, whatever evidence available on record regarding the age of the prosecutrix is not proved beyond all probable doubt and therefore, as per the settled law, the benefit must go to the appellants and thereby it is held that the prosecutrix at the time of the incident was below the age of 18 years is not proved beyond all probable doubt which is essential ingredient for the conviction of all the appellants in the present case.

13. So far as other part regarding commission of forcible sexual intercourse twice or thrice by appellant Jamadar @ Jhadu (A-1) are concerned, the prosecutrix gave entire different statement before the Court. She was confronted for the contradiction of her police statement Ex.-D/2 recorded by Supela police during the investigation, it goes to show that it was a case of love affair between appellant Jamadar @ Jhadu (A-1) and the prosecutrix and she herself left from the house in the company of the appellant. Looking to the entire statement Ex.-D/2, the statement made before the Court may not be taken as gospel truth as she is virtually changing the entire description for the incident as she stated in her police statement under Section 161 of the Code, it would not be safe to convict any of the appellants for the offence they have charged for. Looking to the other improvements, omission and contradiction proved in the police statement of Najama (PW-6) D/3 and her court statement and also for the material omission and contradiction in the statement of Hamida Bano (PW-7) Ex.-D/4 and her court statement and omission and contradiction in police statement of Sheikh Anwar (PW-9) Ex.-D/5 and his court statement, it goes to show that these witnesses also contradicted their earlier statements and improved the story before the Court.

14. The statement of the complainant as given before the Court, the same may not be held as of sterling character in nature, it would not be safe to hold

the appellants guilty for the charges on the basis of material improvements, contradictions shown before the Court during her statement.

15. After appreciation of the entire facts and evidence, this Court is of the view that the prosecutrix was not forcibly kidnapped or induced to compel her for illicit intercourse or for subjecting her to any forceful intercourse. Whatever happened between appellant Jamadar @ Jhadu (A-1) and the prosecutrix, looking to the entire facts, circumstances and evidence, it is a case of consent coupled with the fact that the prosecutrix was not proved minor at the time of the incident.

16. Considering the above facts and circumstances of the case, I am of the opinion that the prosecution has failed to prove commission of rape of minor girl by kidnapping the girl from lawful guardianship of parents/near relatives, as the case may be, and thereby commission of offence punishable under Sections 363, 366 and 376 of the IPC by appellant Jamadar @ Jhadu (A-1) and under Sections 363/34, 366/34, 376/34 of the IPC by appellants Suresh @ Andakhau (A-2) and Smt. Padma (A-3). In the result, the appeal filed by the appellants are allowed. Conviction and sentences imposed on them by the trial Court are hereby set aside. The appellants are acquitted from the charges. Fine amount, if deposited, shall be refunded. They be set at liberty forthwith. The appellants are stated to be on bail. Their bail bond shall continue for a further period of 6 months as per requirement of Section 437-A of the Code.

Sd/-
(C.B.Bajpai)
JUDGE

