

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr. Appeal No.88/2002

Sona Mahato, son of Shiv Dharan Mahato,
aged 22 years, Caste-Dewar, R/o
Dewanpara, Station Maroda, Nevai, Distt.
Durg (Chhattisgarh

APPELLANT
(In Jail)

Vs

State of Chhattisgarh, through P.S. Nevai,
Distt. Durg.

RESPONDENT

For the appellant:

Mr. Ravi Bhagat, Advocate.

For the respondent:

Mr. S.K. Mishra, Panel Lawyer.

S.B.: Hon'ble Mr. Pritinker Diwaker, J

ORDER ON BOARD

01.07.2015

1. This appeal arises out of the judgment of conviction and order of sentence dated 14.01.2002 passed by the 1st Additional Sessions Judge, Durg in S.T. No.281/01 convicting the accused/appellant under Sections 363, 366 & 376 of the Indian Penal Code (for short 'the IPC') and sentencing him to undergo RI for 03 years & fine of Rs.500/-, in default to undergo additional RI for 03 months; R.I. for 07 years & fine of Rs.500/-, in default to undergo additional R.I. for 03 months, and R.I. for 10 years & fine of Rs.500/-, in default to undergo additional R.I. for 03 months respectively.
2. As per prosecution case, on 2.6.2001 while the prosecutrix was returning to her house from Newai Dam after taking bath, the accused/appellant forcibly took the prosecutrix with him to Maroda Railway Station, Durg from where he firstly took her to Banjari, Dharsiva where they stayed for 10 to 12 days and thereafter he took the prosecutrix to Sakti, Korba and stayed there. During this

period of about 28 days, the accused/appellant had sexual intercourse with the prosecutrix. In the meanwhile, when the prosecutrix was found missing, a report (Ex.P-10) was lodged by PW-1 Ghasiram, father of the prosecutrix. After return of the accused/appellant & the prosecutrix, on the basis of statement made by the prosecutrix, FIR (Ex.P-9) was registered against the accused/appellant under Sections 363, 366 & 376 of the IPC. The prosecutrix was medically examined by Dr. Madhu Shrivastava (PW-4) on 01.07.2001 vide Ex.P-4. X-ray of the prosecutrix was taken on 2.7.2001 by Dr. S.A. Mangde (PW-6) who opined her age to be approximately 15 years with a margin of 1 to 3 years on either side. After filing of charge sheet, charges were framed against the accused/appellant under Sections 363, 366 & 376 of the IPC.

3. So as to hold the accused/appellant guilty, the prosecution examined as many as 07 witnesses. Statement of the accused/appellant was recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.
4. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment.
5. Learned counsel for the accused/appellant submits as under:
 - (i) that the prosecutrix remained with the accused/appellant for about 28 days and during this period she went to several places

along with the accused/appellant, but she did not raise any hue & cry for help, therefore, it can easily be said that the prosecutrix was the consenting party.

(ii) that during 28 days of travelling along with accused/appellant, the prosecutrix had never offered any protest for having physical relation with the accused/appellant and therefore it cannot be said that any offence of rape has been committed by the accused/appellant.

(iii) that, the offence under Sections 363 & 366 of the IPC are also not made out against the accused/appellant because the prosecutrix accompanied the accused/appellant of her own and therefore the question of committing the aforesaid offences does not arise.

(iv) that there is no legally admissible evidence in support of the age of the prosecutrix. Even the parents of the prosecutrix had categorically stated that they are not aware about the exact date of birth of the prosecutrix and the mark-sheet (Ex.P-3A) has not been proved as required under the law as neither the author of it nor the person who got admitted the prosecutrix in the school has been examined.

(v) that, as per ossification test conducted by Dr. S.A. Mandge (PW-6), age of the prosecutrix was found to be 15 years which could vary from 01 to 03 years on either side and therefore also the prosecutrix cannot be said to be below sixteen years of age.

(vi) that the incident took place on 02.06.2001 and thereafter the prosecutrix got married with someone else and both the appellant

and the prosecutrix are living happily in their respective married life.

6. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of the accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
7. I have heard learned counsel for the parties and perused the material available on record.
8. Ghasiram (PW-1), father of the prosecutrix, has stated that on the date of incident the prosecutrix had gone to the dam for taking bath but when she did not return, she was searched and on the next morning a missing report was lodged. He has further stated that when he was searching his daughter, he came to know that the accused/appellant took her daughter somewhere and after about one month her daughter returned back to the house and then the matter was reported to the police. He has further stated that his daughter informed him that it is the accused/appellant with whom she had gone. In the cross-examination he has stated that the prosecutrix was living with her maternal uncle and she was admitted in the school situated in other village by her maternal grandfather, who was less educated and had died. He has admitted that he never got admitted the prosecutrix in the school and he cannot say as to whether the date of birth of the prosecutrix recorded in the school register is correct or not. He has further stated that he has eight children and he cannot tell about their date

of birth. He has further admitted that while admitting the prosecutrix in the school, her date of birth is recorded on the basis of assumption.

9. Smt. Devli Bai (PW-2), mother of the deceased, has made almost similar statement as has been made by her husband Ghasiram (PW-1) and even this witness has not given any definite statement about the age of the prosecutrix.
10. The prosecutrix (PW-3) has stated that on the date of incident when she was coming back to her home from dam after taking bath, the appellant forcibly took her by saying that he would keep her as his wife. She has stated that the accused/appellant firstly took her to a nursery situated near the dam and thereafter to Korba by train where she stayed with him for about a month and during this period, on several occasions, the accused/appellant had forcibly committed sexual intercourse with her. She has admitted that while she was being taken by the accused/appellant, number of persons were there but she did not raise alarm for help. She has stated that in the railway platform as also in the train, she did raise her cries but nobody came to her rescue. She has further admitted that they got down at Champa from where they have changed the train and there also number of persons including the police personnel were present but she did not raise any voice nor informed the incident to anyone. She has further stated that she and the accused/appellant had gone to the studio where their photograph (Ex.P-2) was taken.
11. Dr. S.A. Mangde (PW-6) conducted ossification test of the

prosecutrix vide Ex.P-19 and opined that the prosecutrix was aged about 15 years but also stated that there could be variation of 1 to 3 years in the age. PW-5 Aditya Hiradhar, Investigating Officer, has duly supported the prosecution case. PW-7 Omprakash is the witness of seizure and has not stated anything specifically.

12. Close scrutiny of the evidence makes it clear that on 01.07.2001 the prosecutrix went along with the accused/appellant firstly to the railway station Maroda, Durg and from there to Champa, Korba, stayed there for about a month and during this period, on several occasions, the accused/appellant had committed sexual intercourse with the prosecutrix but she did not make any protest. Therefore, the story put forth by the prosecutrix appears to be highly improbable and creates doubt in the mind of the Court as to whether the accused/appellant had forcibly taken her or it was she who had accompanied him of her own free will. In the totality of facts and circumstances of case, the quality of evidence adduced by the prosecution, particularly evidence of the prosecutrix and her entire conduct, the possibility cannot be ruled out that the prosecutrix out of her own free will accompanied accused/appellant to several places and she was a consenting party and therefore it cannot be said that the accused/appellant had kidnapped or abducted the prosecutrix from the lawful guardianship with intent to force or compel her for marriage, illicit intercourse etc.
13. Next question arises for consideration of this Court is about the age of the prosecutrix. Although school mark-sheet of the prosecutrix has been seized by the prosecution vide Ex.P-3A in which date of

birth of prosecutrix is mentioned as 25.5.87, but this document does not appear to be reliable because author of the same has not been examined. Even as per statement of PW-1 Ghasiram, father of the prosecutrix, age of the prosecutrix may have been recorded on the basis of assumption. He has stated that the prosecutrix was staying in the house of her maternal uncle and she was admitted in the school by her maternal grandfather. He has further stated that he is not aware about exact date of birth of prosecutrix or his other children. Similar statement has been made by PW-2 Smt. Devli Bai, mother of the prosecutrix. Even, if the ossification test is taken to be correct where the doctor has opined her to be of 15 years, the doctor has categorically stated that there could be variation of 1 to 3 years in age. Thus there is no evidence in respect of age of the prosecutrix on which basis her exact age can be determined and therefore it is difficult to hold that at the time of incident, age of the prosecutrix was below 16 or 18 years. In these circumstances, the appellant is definitely entitled to be acquitted of the charges leveled against him by extending him benefit of doubt.

14. In the result, the appeal is allowed. Conviction of accused/ appellant under Sections 363, 366 & 376 of IPC are hereby set aside and he is acquitted of aforesaid charges by extending him benefit of doubt. He is on bail, therefore, his bail bonds shall continue for a period of six months from today in view of provisions of Section 437-A of Cr.P.C.

Sd/
(Pritinker Diwaker)
J U D G E

roshan/-