

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 104 of 2011

1. Sanju @ Sanjay Kumar Yadav S/o Muneshwar Yadav, aged about 25 years, Occupation - Hotel Mishtry, resident of village Behind Rly Station Bakipur, Ambikapur, Present Address - Godhanpur, Siktapra (Ambikapur) District Surguja (CG)

---- Appellant

In Jail

Versus

1. State Of Chhattisgarh, Through Mahila Police Station Ambikapur, District Surguja (CG)

---- Respondent

For appellant : Shri Sunil Tripathi, Advocate.
For Respondent/State : Shri Chandresh Shrivastava, Advocate.

Hon'ble Shri Justice Pritinker Diwaker, &

Hon'ble Shri Justice I.S. Uboweja, JJ

Judgment On Board by Pritinker Diwaker, J

06/08/2015:

This appeal arises out of the judgment of conviction and order of sentence dated 19.1.2011 passed by the Special Judge, Surguja (Ambikapur) in Special S.T.No.14/09 convicting and sentencing the accused/appellant as under:

Conviction	Sentence
u/s 363 of Indian Penal Code.	R.I. for five year, to pay a fine of 1000/- and in default to undergo R.I. for six months additionally.
u/s 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act read with Section	Life imprisonment, to pay a fine of 1000/- and in default to undergo

366 of I.P.C.	R.I. for six months additionally.
u/s 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act read with Section 376(1) of I.P.C.	Life imprisonment, to pay a fine of 1000/- and in default to undergo R.I. for six months additionally.

All the sentences were directed to run concurrently.

02. As per prosecution case, on 9.10.2008 at around 12 in the noon the prosecutrix had left her house for purchasing tobacco from the shop. When she did not return till evening, a missing report was lodged on 10.10.2008 vide Ex.P/7C by her father PW-2 Chetan Minj. It is further alleged that on 9.10.2008 the accused/appellant had taken the prosecutrix along with him from Village - Soutar, Pratappur, Distt. Surguja to Chirmiri i.e. more than about 100 km away from her house, to the house of his sister where they stayed till 25.10.2008 when the prosecutrix returned to her house and disclosed the incident to her mother. Thereafter, her father made a written report Ex.P/1 and then FIR Ex.P/4 was registered on 25.10.2008 at the instance of father of the prosecutrix against the accused/appellant under Sections 363, 366, 376 of IPC and Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (in short "the Act"). The prosecutrix was medically examined on 25.10.2008 by PW-5 Dr. Lata Goyal vide Ex.P/9 and she noticed that there was no sign of injury on the body of the prosecutrix, her secondary sexual characters were fully developed, her hymen was old torn and she was habitual to sexual intercourse. Caste certificate of the prosecutrix was seized vide Ex.P/12A and likewise, her birth certificate was also seized vide Ex.P/5 wherein her date of birth is shown to be 8.12.1995. After investigation,

charge sheet was filed against the accused/appellant under Sections 363, 366, 376 of IPC and Section 3(1)(xii) of the Act. However, while framing charge the trial Judge framed charges under Sections 363 of IPC, 3(2)(v) of the Act or in the alternative 366 of IPC and 3(2)(v) of the Act or in the alternative 376(1) of IPC.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 8 witnesses. Statement of the accused was also 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.

04. 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.

05. Learned counsel for the appellant submits as under:

(i) that the prosecutrix was a consenting party, she remained with the appellant for about 15 days, visited several places without any resistance and as such, the accused/appellant cannot be convicted for any offence.

(ii) that the prosecution has utterly failed to prove age of the prosecutrix, merely on the basis of birth certificate Ex.P/5 wherein date of birth of the prosecutrix is shown as 8.12.1995 it cannot be said that she was minor on the date of commission of the alleged offence. None of the witnesses has been examined by the prosecution on whose disclosure the date of birth of the prosecutrix was recorded as

8.12.1995.

(iii) that caste certificate of the prosecutrix has also not been proved by the prosecution as required under the law and merely by filing caste certificate Ex.P/12A it cannot be held that the prosecutrix was a member of scheduled tribe community.

(iv) that the prosecutrix has not stated that she was subjected to rape only because she belongs to a particular caste.

(v) that the investigation done by the police authorities is itself faulty because the same has been conducted by PW-4 Smt. Nilima Tirki, who is a Sub Inspector whereas as per Rule 7 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Rules, 1995, investigation in such cases is to be done by an officer not below the rank of Dy.S.P. and as such, due to faulty investigation the entire trial stood vitiated.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel conviction of the accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the judgment impugned warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material available on record.

08. PW-1 the prosecutrix in her Court statement has stated that on the date of incident she had gone to shop for purchasing tobacco, there the accused/appellant came and after threatening her took her on his bicycle to Kedarpur, then on a rickshaw up to some distance and thereafter to a jungle afoot. The accused/appellant took her to the house of his sister where he committed sexual intercourse with her.

They stayed there for about a week. She has further stated that after returning she narrated the entire incident to her mother and then written report Ex.P/1 was given by her. In cross-examination, she has stated that when she was being taken by the accused/appellant, on the way there were several shops and houses, but she did not inform any one. She has further stated that she was sitting on the carrier of the cycle whereas the accused/appellant was riding the cycle. She did not inform any passersby or raise hue and cry while riding with the appellant on his bicycle. In the house of sister of the appellant, husband and children of the appellant's sister were also there but she did not inform any one about the incident. She has stated that the accused/appellant had taken her to Chirmiri from Ambikapur by train but she did not inform the incident to anyone, either at Chirmiri or even while traveling in the train. They stayed there for a week, during day time the accused/appellant used to leave the house for his workplace, she used to sleep with him without any protest and that there she used to perform her routine work. She has further stated that when the persons residing in the vicinity objected to their living together, they came back to their houses.

09. PW-2 Chetan Minj, father of the prosecutrix, has stated that when the prosecutrix did not return to her house, a missing report Ex.P/7C was lodged. He has stated that at the time of birth of the prosecutrix he had recorded her date of birth with the Village Chowkidar, however, the said Village Chowkidar informed him that the document bearing date of birth of the prosecutrix has been eaten away by the termite. In para-7, he has categorically stated that he is an illiterate person, he cannot tell

the date, month and year of birth of the prosecutrix. He has further clarified that no document was given to him by Village Chowkidar wherein date of birth of the prosecutrix was recorded. PW-3 Smt. Pushpa Tirki, Head Constable, recorded missing report in the Rojnamchasanha Ex.P/7. PW-4 Smt. Nilima Tirki, Sub Inspector, did major part of investigation. In para-10 she has stated that she did not obtain any educational certificate of the prosecutrix nor did she refer the prosecutrix for ossification test. She has stated that on being produced by Chetan Minj (PW-2) she had seized caste certificate Ex.P/12 of the prosecutrix which was issued by the Tehsildar. She has admitted that she did not enquire from any Chowkidar regarding age of the prosecutrix. She had also seized birth certificate Ex.P/5 of the prosecutrix. PW-5 Dr. Lata Goyal had medically examined the prosecutrix vide Ex.P/9 and found that secondary sexual characters of the prosecutrix were fully developed, there was no sign of internal or external injury on her body, hymen was old torn, vagina was admitting two fingers easily and in her opinion, she was habitual to sexual intercourse and no definite opinion could be given regarding rape with her. She has admitted that she had not recommended for ossification test of the prosecutrix for ascertaining her age since there was no such request from the police station in this regard.

10. PW-6 Sakranti Bai appears to be neighbour of the prosecutrix. She has stated that name of her daughter is Ajanti and that prosecutrix had born around the time when her daughter was born and her daughter is about 14-15 years. She has also stated that she is not aware about the exact age of her daughter. PW-7 Smt. Manisha Thakur Ravte, City

Superintendent of Police, filed Challan and did part of investigation i.e. sending the appellant for medical examination, obtaining consent of the prosecutrix and her father for medical examination of the prosecutrix, preparing Panchanama Ex.P/14, effecting seizure of undergarments of the prosecutrix vide Ex.P/2, preparing arrest memo of the accused Ex.P/16 and sending the information of arrest to relatives of the appellant and then filing of Challan.

11. To bring home an offence under Section 363 of IPC, age of the prosecutrix is a material point because unless it is shown that she was below 18 years of age at the relevant time, there could be no case of kidnapping within the meaning of Section 363 of IPC. The doctor's estimate about age does not amount to proof, but is merely an opinion. The prosecution is to prove that age of the prosecutrix on the date of incident was below 18 years. When evidence on record does not definitely and doubtlessly show that she was below 18 years, the benefit of doubt should go in favour of the accused. Even otherwise, from the evidence adduced by the prosecution, the basic ingredients of Section 363 of IPC have not been proved by it as required under the law.

12. In the case in hand, close scrutiny of the evidence makes it clear that there is no legally admissible evidence in respect of age of the prosecutrix. PW-2 Chetan Minj, father of the prosecutrix, has categorically stated that he is not aware about the date of birth of the prosecutrix as he does not remember the date, month or year of her birth. He has stated that though he had recorded the date of birth of the prosecutrix with the Village Chowkidar but the said document has been

eaten away by the termite. Birth certificate Ex.P/5 has been filed by the prosecution wherein her date of birth is mentioned as 8.12.1995 but there is no evidence adduced by the prosecution as to on what basis such entry was made in the said birth certificate. Further, no ossification test of the prosecutrix has been done to ascertain her age.

13. Likewise, though caste certificate of the prosecutrix has been filed as Ex.P/12A, but it has also not been proved by the prosecution as required under the law. Most importantly, even the prosecutrix has not stated that she was subjected to forcible sexual intercourse on the ground that she is a member of a Scheduled Tribe community. Thus considering the nature and quality of evidence adduced by the prosecution, it has miserably failed to prove that on the date of incident the prosecutrix was minor and further, failed to prove that the prosecutrix belongs to scheduled tribe community, especially when the appellant has not admitted the caste of the prosecutrix and has denied the same.

14. Now the question for consideration of this Court is whether the accused/appellant committed rape with the prosecutrix?

15. From the statement of the prosecutrix it is apparent that she went with the accused/appellant up to Chirmiri i.e. more than 100 km away from her residence and thereafter, accompanied him to various places without any hue and cry. While moving with the appellant here and there she did not inform any one that she has been forcible taken away by the appellant, though she had ample opportunity to do so. She remained with the accused/appellant in the house of his sister for more

than a week, when he used to leave the house for his workplace she used to remain there all alone but never tried to escape from there. She has admitted that she used to sleep with the accused/appellant like husband and wife of her own free will, the accused/appellant never abused or beat her. She has specifically denied that during sexual intercourse there had been talk about performing marriage in future. It was only when the persons residing in the neighbourhood objected to their living together, they came back to their houses. Thus from the overall evidence of the prosecutrix, it is apparent that she was accompanying the accused/appellant of her own free will, the sexual intercourse with him was consensual and the accused/appellant had not kidnapped or abducted her from the lawful guardianship with intent to force or compel her for marriage or illicit intercourse etc. This fact also finds due corroboration from the medical evidence, according to which there was no sign of internal or external injury on her body, her hymen was old torn and she was found to be habitual to sexual intercourse.

16. Yet another important aspect of the case is that the main investigation in the present case has been done by PW-4 Nilima Tirki, Sub Inspector, and only formalities of filing Challan and sending some of the reports have been done by PW-7 Smt. Manisha Thakur Ravte, C.S.P. Being so, there is utter violation of Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (in short 'the Rules, 1995') which reads as under:

“7. Investigating Officer - (1) An offence committed under the act shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. The

investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority basis within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.

(3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution, the officer-in-charge of Prosecution and the Director General of Police shall review by the end of every quarter the position of all investigations done by the investigating officer.”

17. Thus in view of clear mandate of Rule 7 of the Rules, 1995 and various decisions of the Supreme Court in this regard, it is only the officer not below the rank of Deputy Superintendent of Police appointed by the State Government/Director General of Police/Superintendent of Police who is competent to investigate the offence under this special Act. However, it has not been done in the present case where major part of the investigation has been carried out by the Sub Inspector (PW-4), which is in flagrant violation of the legal provision rendering the entire trial as vitiated.

18. On the basis of aforesaid analysis, we are of the considered view that the prosecution has utterly failed to prove the charges leveled against the accused/appellant by the evidence adduced beyond the

shadow of reasonable doubt. The trial Court has committed a grave illegality in holding the accused/appellant guilty under Sections 363, 366, 376(1) of IPC and Section 3(2)(v) of the Act on the basis of evidence available on record. The accused/appellant is entitled to be acquitted of the said charges by extending him benefit of doubt.

19. In the result, the appeal succeeds and is allowed. Impugned judgment is set aside and the accused/appellant is acquitted of all the charges leveled against him. He is reported to be in jail, therefore, he be set free forthwith if not required to be detained in connection with any other offence.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S. Uboweja)

Judge