

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 298 of 2008**

- Pappu @ Ajay S/o Motilal, aged about 27 years, R/o Gram Mana, District Rajgarh.

---- Appellant**Versus**

- State of Chhattisgarh Through P.S. Antagarh, District North Bastar Kanker (C.G.)

---- Respondent

For Appellant.	-	Shri Ratnesh Agrawal, counsel under the authority of Shri R.S. Marhas, counsel.
For Respondent	-	Shri Arvind Dubey, Panel Lawyer.

Hon'bel Shri Justice Pritinker Diwaker**Judgment On Board****09/02/2016**

This appeal arises out of the judgment of conviction and order of sentence dated 19.02.2008 passed by the Additional Sessions Judge (FTC), Bhanupratappur, District North Bastar Kanker in S.T. No.16/2007 convicting the accused/appellant under Sections 363, 366 and 376 IPC & sentencing him to undergo R.I. for three years and pay fine of Rs.500/-, R.I. five years and pay fine of Rs.500/- & R.I. for seven years and pay fine of Rs.500/- with default stipulations.

02. As per prosecution case, on 24.01.2006 a missing report Ex.P/18 was lodged by Uttam Kumar (PW/2)-maternal uncle of the prosecutrix alleging in it that the prosecutrix had gone to the house of her maternal grand-father Dhanraj but was missing since 09.01.2006. On the basis of this report, entry was made in the Rojnamcha Sanha.

After search being made, on 05.03.2006 the prosecutrix was recovered from the house of the accused/appellant and accordingly recovery panchanama (Ex.P/23) was prepared. On 08.03.2006 the prosecutrix was sent for medical examination and the same was done on 09.03.2006. In the meanwhile, FIR Ex.P/1 was registered against the accused/appellant under Sections 363, 366 and 376 IPC. After investigation, charge sheet was filed against the accused/appellant under Sections 363, 366 and 376 IPC and charges were also framed accordingly.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 09 witnesses. Statement of the accused/appellant 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 has convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment. Hence, this appeal.

05. Learned counsel for the appellant submits as under:

(i) that the prosecutrix accompanied the accused/appellant of her own without offering any protest, she remained with him for about two months and thus it is apparent that she was a consenting party;

(ii) that there is no legally admissible evidence in respect of age of the prosecutrix, thus, it cannot be said that on the date of commission of offence she was minor.

(iii) Once it is held by this Court that the prosecutrix was not minor

then the accused/appellant is liable to be acquitted of the charges levelled against him.

(iv) The accused/appellant has already undergone the entire sentences imposed upon him and therefore he may be set free forthwith.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that mother of prosecutrix has categorically stated that on the date of commission of offence her daughter was minor, therefore, question of consent of the prosecutrix does not arise and as such the conviction of the appellant is in accordance with law.

07. I have heard learned counsel for the parties and perused the material available on record.

08. Chandabai (PW/1)-mother of prosecutrix has stated that the prosecutrix was born in the year 1991. She was found missing since 09.01.2006 and report of which was lodged in the police station. According to her, after being recovered the prosecutrix informed that the accused/appellant had physical relation with her. This witness has further stated that she had lodged the report. In cross-examination she has stated that she does not remember her own date of birth and that after prosecutrix she delivered another female child but does not remember the date of birth of her second issue, and thereafter she herself stated that after the prosecutrix she delivered a baby boy. Uttam Kumar (PW/2) is maternal uncle of the prosecutrix, who lodged the missing report. Prosecutrix (PW/3) has stated that she studied upto class 6th and thereafter she had left her study. She has stated that she met the accused/appellant in the house of her maternal uncle where accused/appellant asked her to accompany him to Bhanupratappur but

when she boarded the train she came to know that they were not going to Bhanupratappur and after travelling for about 1 ½ day she reached the house of accused/appellant where he had physical relation with her. From her cross-examination, it appears that she was residing in a dense locality and that she had opportunity to come out from the clutches of the accused/appellant. Smt (Dr.) Hemlata Sahu (PW/4) who medically examined the prosecutrix vide Ex.P/6 has not noticed any injury on her body and also on private part; her vagina admitted two fingers easily; membrane of old hymen was ruptured. Though this witness has stated in the Court that pubic hair and armpit hair of the prosecutrix were developing but in her medical report she has stated that her private organs were developed. Dr. A.R. Gota (PW/6) who medically examined the accused/appellant vide Ex.P/9 has stated that the accused/appellant was capable of performing sexual intercourse. Laxman Singh (PW/7)-Teacher has proved the school register Ex.P/10 recording the date of birth of prosecutrix as 02.06.1991. In cross-examination he has admitted that the entries were not made by him and might have been made by his predecessor. P.C. Shrivastava (PW/8)-Inspector did the major part of investigation. Kamlesh Thakur (PW/9)-Inspector helped in investigation. Ram Prasad Sinha (PW/9)-Investigating Officer has duly supported the prosecution case.

09. Close scrutiny of the evidence makes it clear that on 09.01.2006 the prosecutrix had gone to the house of her maternal uncle Uttam Kumar (PW/2) from where she was allegedly taken away by the accused/appellant to Bhanupratappur by train. It has come in the evidence of prosecutrix that she travelled with the accused/appellant in the train for about 1 ½ day, she neither made any complaint to anyone in

the train nor did she lodge any report thereafter. It is admitted position that the prosecutrix stayed with the accused/appellant in his house for more than two months and during that period she was allegedly subjected to forcible intercourse by the appellant. A bare reading of the Court statement and the case diary statement of the prosecutrix goes to show that there are omission and contradiction on material points. While improving in the Court she has stated in para 2 of her deposition that she was not aware as to by what means the appellant took her away as at that time she was unconscious. She had admitted that the train by which they were traveling stopped at number of places, thus, considering the entire statement of the prosecutrix, the medical evidence available on record as also the conduct of the prosecutrix, this Court has no hesitation to say that the prosecutrix was a consenting party. Now, the only question remains for consideration before this Court is that whether on the date of commission of offence the prosecutrix was minor or not? The trial Court has already disbelieved the entry made in the school register by holding that the author who recorded the entry has not been examined and the evidence, which has been relied upon by the Court below, is a oral testimony of Chandabai (PW/1)-mother of prosecutrix. However, if entire evidence is seen, this witness (Chandabai PW/1) does not appear to be trustworthy so far as disclosure of age of prosecutrix is concerned. This witness has admitted that neither she remember her own date of birth nor she knows the date of birth of her other children. Considering her statement, it would not be safe for this Court to hold the prosecutrix to be a minor. Even as per medical report of the prosecutrix, she was developed girl. Considering all the aspects of the case, it can be said that there is no clinching, credible and reliable evidence in

respect of age of the prosecutrix. Even medical report of the prosecutrix does not supports the prosecution case. In these circumstances, the appellant is definitely entitled to be acquitted of the charges leveled against him by extending him benefit of doubt.

10. In the result, the appeal is allowed. Conviction of the accused/appellant under Sections 363, 366 and 376 IPC and sentenced imposed thereunder are hereby set aside. He is acquitted of the said charges by extending him benefit of doubt.

Sd/-

(Pritinker Diwaker)

JUDGE