

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.2464 of 1998**Judgment Reserved on : 21.12.2016Judgment Delivered on : 23.12.2016

Mohan Lal, S/o Chamru Satnami, aged about 20 years, R/o Village Sundreli,
P.S. Baradwar, District Bilaspur (MP) (now Chhattisgarh)

---- Appellant**versus**

State of M.P. (now Chhattisgarh) through District Magistrate, Bilaspur (MP)
(now Chhattisgarh)

--- Respondent

For Appellant	:	Ms. Pritha Ghoshal, Advocate appears on behalf of Ms. Indira Tripathi, Advocate
For State/Respondent	:	Shri S.K. Mishra, Panel Lawyer

Hon'ble Shri Justice Anil Kumar Shukla**C.A.V. Judgment**

1. This appeal has been preferred under Section 374 of the Code of Criminal Procedure (henceforth 'Cr.P.C.') being aggrieved by the judgment dated 6.10.1998 passed in Sessions Trial No.238 of 1998 by the Additional Sessions Judge, Sakti, District Bilaspur, whereby the Appellant/accused has been convicted under Sections 363, 366 and 376(1) of the Indian Penal Code (henceforth 'I.P.C.') and has been sentenced to undergo rigorous imprisonment for 1 year and to pay fine of Rs.1,000/- in default of payment of fine to further undergo rigorous imprisonment for 3 months, rigorous imprisonment for 5 years and to pay fine of Rs.2,000/- in default of payment of fine to further undergo rigorous imprisonment for 6 months, rigorous imprisonment for 7 years and to pay fine of Rs.3,000/- in default of payment of fine to further undergo rigorous imprisonment for 1 year, respectively. All the sentences are directed to run concurrently.
2. Briefly stated, the prosecution case is that the prosecutrix (PW-1)

and the Appellant/accused are residents of Village Sundreli, Police Station Baradwar. On 13.4.1998, at about 2:00 a.m., when the prosecutrix (PW-1) came out of her home for discharging urine, the Appellant came there and took her away with him on the allurement that he will marry her. On the way, at Khar, he committed sexual intercourse with her. They went from Village Sundreli to Village Champa on their feet. Thereafter, they went from Champa to Bilaspur Railway Station by a bus. On missing of the prosecutrix (PW-1) as also the Appellant from the village, Harichandra (PW-3), father of the prosecutrix (PW-1) sent his brother-in-law Manoj Kumar (PW-11) for search of the prosecutrix (PW-1). Manoj Kumar (PW-11) caught the prosecutrix (PW-1) along with the Appellant in Bilaspur Railway Station. In the Railway Station, the Appellant was waiting for Utkal Express to take the prosecutrix (PW-1) to Delhi. On receiving information, Government Railway Police, Bilaspur took both the prosecutrix (PW-1) and the Appellant into their custody and produced them before the concerned Police Station Baradwar. Harichandra (PW-3), father of the prosecutrix (PW-1) lodged First Information Report (Ex.P-1) in Police Station Baradwar. The Appellant was arrested vide Ex.P-13. The prosecutrix (PW-1) was sent for medical examination vide Ex.P-10. Dr. Smt. S.D. Kanwar (PW-12), after examining the prosecutrix (PW-1), gave her report (Ex.P-11). Dr. S. Chatterjee (PW-9) conducted x-ray examination of the prosecutrix (PW-1) and gave his report (Ex.P-9). The Appellant was also sent for medical examination. Dr. J. Singh (PW-10) examined the Appellant and gave his report (Ex.P-6). A letter written by the Appellant to the prosecutrix (PW-1) was seized vide Ex.P-3. Another letter (Ex.P-5) written by the Appellant to the prosecutrix (PW-1) was also seized. Vaginal slide of the

prosecutrix (PW-1) was prepared. The vaginal slide of the prosecutrix (PW-1) and her underwear were seized vide Ex.P-8. The hair cut from near the penis of the Appellant were seized vide Ex.P-7. The seized articles were sent for forensic examination vide Ex.P-7 and its acknowledgment of receipt in the office of the FSL is Ex.P-8. Report of the FSL is not available on the record. Statements of the witnesses were recorded under Section 161 Cr.P.C. After completion of the investigation, the Appellant/accused was charge-sheeted for the offences punishable under Sections 363, 366 and 376 I.P.C. He denied the guilt. On his denial, trial was conducted. The prosecution examined as many as 14 witnesses. The Appellant/accused, except his examination under Section 313 Cr.P.C., did not examine any witness in his defence. After affording opportunity of hearing and leading evidence to both the parties, the Trial Court has convicted and sentenced the Appellant/accused as mentioned above. Hence this appeal.

3. Learned Counsel appearing for the Appellant/accused has argued that the impugned judgment of conviction and sentence passed by the Trial Court is contrary to the facts and law. On the date of incident, the age of the prosecutrix (PW-1) was more than 18 years and she was a consenting party. Therefore, no case is made out against the Appellant and he deserves to be acquitted of the charges framed against him. In support of her contentions, Learned Counsel for the Appellant has placed reliance on **Dethari v. State of M.P. (Now C.G.), 2007 (2) CGLJ 496.**
4. Per contra, Learned Panel Lawyer appearing for the State/Respondent has supported the impugned judgment. He submitted that the Trial Court has rightly convicted and sentenced the Appellant/accused and, therefore, the appeal deserves to be

dismissed.

5. I have heard Learned Counsel appearing for the parties and perused the material available on record carefully.

6. Following questions arise for adjudication in this appeal:

- (1) Whether on the date of incident the age of the prosecutrix (PW-1) was below 18 years?
- (2) Whether on the date of incident the Appellant/accused kidnapped the prosecutrix (PW-1) from lawful guardianship of her parents and without their consent?
- (3) Whether the Appellant kidnapped the prosecutrix (PW-1) without her consent for marrying her or for committing illicit sexual intercourse with her by using force or by seducing her?
- (4) Whether the Appellant/accused committed illicit sexual intercourse with the prosecutrix (PW-1) without her consent?

7. As far as the age of the prosecutrix (PW-1) is concerned, birth certificate of the prosecutrix (PW-1) or Kotwari register or any document regarding admission of the prosecutrix (PW-1) in any school or any transfer certificate issued by any school showing date of birth of the prosecutrix (PW-1) has not been produced by the prosecution.

8. Regarding age of the prosecutrix (PW-1), her mother Meena Kumari (PW-2) has deposed that the prosecutrix is her elder daughter. She would be of 15-16 years of age. This witness has stated in cross-examination at paragraph 3 that she has deposed the age of her daughter/prosecutrix (PW-1) by approximation.

When did her daughter take birth, she was unable to depose the date and day of her birth. Therefore, if age of her daughter/prosecutrix (PW-1) would be 19-20 years, she was not aware.

9. Likewise, Harichandra (PW-3), who is father of the prosecutrix (PW-1), has deposed that the age of the prosecutrix (PW-1) was 13-14 years, but in cross-examination, at paragraph 12, he has stated that when did his daughter/prosecutrix (PW-1) take birth, he was unable to state the date and day of her birth.
10. Nothing has been stated in her examination-in-chief by the prosecutrix (PW-1) regarding her age nor any question has been put to her in cross-examination regarding her age.
11. For determination of age of the prosecutrix (PW-1), the prosecution has conducted her ossification test. This test has been conducted by Dr. S. Chatterjee (PW-9). This witness has deposed that at the relevant time, he, being Assistant Surgeon, was serving in the District Hospital, Bilaspur as Incharge Radiologist. He has further deposed that on 16.4.1998, the prosecutrix (PW-1), on the advice of Smt. S.D. Kanwar (PW-12), Assistant Surgeon, Community Health Centre, Sakti, was produced before him by Santosh, Police Constable No.703, Police Station Baradwar for her x-ray examination regarding determination of her age. He has deposed that x-ray of right iliac creast, right wrist and right elbow of the prosecutrix (PW-1) was taken out. He has submitted his report (Ex.P-9) in which he has stated as under:

(1) Olecrenon process of ulna bone had been fixed, whose age of fixation is 15 years.

(2) Fixation of distant ends of radius and ulna

bones had just started to fix, whose age of fixation is 17-18 years.

- (3) Iliac creast was appearing and was not fixed, whose age of appearance is 14 years and age of fixation is 18-19 years.

Dr. S. Chatterjee (PW-9), in his report (Ex.P-9), has opined the age of the prosecutrix (PW-1) to be approximately 16-17 years. In cross-examination, he has deposed that in the age of the prosecutrix (PW-1) opined radiologically, the range of error may be upto (+/-) 2 years.

12. With regard to the range of error in the age, the judgment rendered in **M.C. Prasannan v. State, 1999 Cri.L.J. 998** may be referred to. In this judgment, it has been observed that the range of error in the determination of age on the basis of the x-ray report may be upto (+/-) 3 years. Paragraphs 18, 19 and 20 of the judgment read as follows:

“18. Modi in his 'Medical Jurisprudence' at page 31 stated as follows:-

“..... In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken and an opinion should be given according to the following table, but it must be remembered that too much reliance would not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of the development. Recent work has shown that the range of error may be up to (+/-) 3 years.”

19. The table showing the age in years of the appearance and fusion of some of the epiphysis shows that fusions of some of the joints occur in between the age of 16½ to 18, 17 to 19 and 14 to 17 years. The age given in this table is also not accurate as per the author himself who opined that the range of error in the table may be up to (+/-) 3 years.

20. It may be noted that the doctor who has given evidence although contrary to Medical Jurisprudence has stated that the age of the girl should be between 13 and 15 years. If that be so, taking the opinion of Modi as stated in his Medical Jurisprudence, the range of error may be up to (+/-) 3 years. In that event it may be noted that the age of the girl may be 16 years. The learned Sessions Judge held that the age is between 12 and 15 years so that even taking into consideration the range of error is (+/-) 3 years, the girl's age will come within 15 and so that she may be treated as minor.”

- 13.** Therefore, in these circumstances, in the instant case, so far as determination of age of the prosecutrix (PW-1) is concerned, the opinion which is in favour of the Appellant shall be taken into consideration. On the date of incident, the age of the prosecutrix (PW-1) has been opined to be 16-17 years (Ex.P-9). In view of the principle laid down in **Prasannan case** (supra), taking into consideration the range of error of (+/-) 3 years, the age of the prosecutrix (PW-1) comes to 19 years. The first question, framed above, is adjudicated accordingly. Therefore, from the age point of view, no case is made out against the Appellant/accused under

Section 376(1) IPC because on the date of incident the age of the prosecutrix (PW-1) exceeds to 16 years. Likewise, no case is made out against the Appellant under Sections 363 and 366 IPC because on the date of incident the age of the prosecutrix (PW-1) exceeds to 18 years. The second and third questions, framed above, are adjudicated accordingly.

14. The next important question is that whether the prosecutrix (PW-1) was a consenting party? From the evidence of the prosecutrix (PW-1), it is evident that on the date of incident, at about 2:00 O'clock in the night, when she came out of her home for discharging urine, the Appellant took her away with him. The prosecutrix (PW-1) accompanied the Appellant and went along with him from Village Sundreli, Police Station Baradwar to Village Champa on her feet. Thereafter, she went along with the Appellant from Champa to Bilaspur by a bus. Thereafter, she was waiting in the Bilaspur Railway Station to go to Delhi. At that time, the maternal uncle (*Mama*) of the prosecutrix (PW-1) caught her with the Appellant on the Railway Station. During this period of journey from her home to Bilaspur Railway Station, at no point of time, the prosecutrix (PW-1) raised any alarm nor she objected to the Appellant against taking her with him.
15. The prosecutrix (PW-1) has also stated in her deposition at paragraph 4 that she and the Appellant had already an affair. Some letters of the Appellant have been seized from the prosecutrix (PW-1). In her deposition, at paragraph 18, on being questioned by the Trial Court, the prosecutrix (PW-1) stated that parents of the Appellant did not agree to marriage of the Appellant with her. She wanted to marry with the Appellant. Her parents also wanted to marry her with the Appellant. The prosecutrix (PW-

1) has further stated that even today also, if the Appellant would marry her, she is ready for the marriage. Thus, from the evidence of the prosecutrix (PW-1), it is evident that in the night of the incident, she had gone with the Appellant with her consent. She has not deposed that she was forcibly taken away by the Appellant. She did not raise any alarm or objection at any point of time against taking her from her home at Village Sundreli to Bilaspur Railway Station by the Appellant. From the above evidence of the prosecutrix (PW-1), it is apparent that she was a consenting party. The fourth and last question is adjudicated accordingly.

16. In view of the above discussion, I find that no case is made out against the Appellant/accused under Sections 363, 366 and 376(1) of the Indian Penal Code.
17. Consequently, the criminal appeal is allowed. The impugned judgment of conviction and sentence under Sections 363, 366 and 376(1) of the Indian Penal Code is set aside. The Appellant/accused is acquitted of the charges framed against him. It is reported that he is on bail. His bail bonds shall continue for a further period of six months from today in terms of Section 437A of the Code of Criminal Procedure.

Sd/-
(Anil Kumar Shukla)
JUDGE