

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1106 of 1999**

Kartik Ram S/o Chand Ram Jaiswal, Age 18 years, R/o village Devsagar,
Thana, Bilaigarh, Distt. Raipur (CG).

---- Appellant

Versus

The State of Chhattisgarh, through the Police Station, Bilaigarh, Distt. Raipur
(CG).

---- Respondent

For Appellant
For respondent/State

Shri Hemant Gupta, Advocate.
Shri OP Sahu, Govt. Advocate.

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

21/12/2016

1. The present is a jail appeal by the appellant-accused against the judgment of conviction for the offence under Section 376(1) IPC wherein the court below i.e. Ist Additional Sessions Judge, Bilaigarh has found the appellant guilty of offence and after conviction sentenced him to undergo RI for 10 years with fine of Rs.10,000/- with default stipulation vide judgment dated 28.01.1999.
2. The appellant himself at the time of commission of the offence was aged about 18 years of age. The prosecution story in brief is that, a report was lodged on 24.06.1997 by the prosecutrix alleging that the appellant is said to have in between November, 1995 to April, 1997, on the pretext of marrying the prosecutrix is said to have maintained physical relationship by having sexual intercourse with the prosecutrix

on many occasions. In due course of time, it is said that the prosecutrix got conceived from the present appellant and in June, 1997 a community meeting was held wherein the appellant is said to have asked the prosecutrix to get an abortion done. Subsequently, another meeting was held, still when no conclusion could be arrived at in the meeting, the prosecutrix and her family members decided to report the matter to the police Station at Bilaigarh. It is thereafter that an FIR, Ex. P/7 was lodged. Later on, the prosecutrix as well as the appellant were subjected to medical examination. As far as the prosecutrix being pregnant is concerned, it was found to be positive with a report that she is carrying 30-32 weeks pregnancy. In due course of time a male child was born to the prosecutrix on 04.07.1997.

3. On the basis of report and investigation conducted, the appellant was arrested and charge sheet was filed. The matter was put to trial wherein the case was registered as Sessions Trial No.365/1997.
4. The prosecution, in all, has examined as many as 9 witnesses and on behalf of defence, no witness was examined.
5. After conclusion of trial, the court below finally found the appellant to be guilty of having committed an offence of rape and has sentenced him for the period as enumerated in the first paragraph of this judgment, leading to filing of this appeal. It was also held that the prosecutrix in the instant case was a minor and her age was shown to be less than 16 years,
6. Learned counsel appearing for the appellant assailing the judgment

submits that the entire judgment of court below is totally bad in law for the reason that the court below has not appreciated the evidence in its proper perspective. Counsel for the appellant vehemently submits that it is a case where the relationship that the prosecutrix had with the appellant was a consensual relationship and the prosecution has miserably failed to prove the age of the prosecutrix so as to declare her to be a minor. In the absence of any cogent and concrete evidence to determine the age of the prosecutrix, the findings of the court below holding her to be under 16 years of age is bad in law and the said finding thus is not sustainable. As far as relationship between the two is concerned, since it is a consensual relationship, the case does not fall within the ambit of definition of rape as defined under Section 375 IPC.

7. According to appellant since Dr. Rama Tiwari, PW-1, who has examined the prosecutrix was only a gynecologist, she could not have ascertained the age of the prosecutrix conclusively. In addition, the appellant referring to evidence of Doctor submits that there is a finding that the prosecutrix at the time of her examination already had 28 teeth in her mouth which itself is an indication that she was a girl aged more than 16 years. Likewise, it is also submitted that there is no documentary evidence to prove the age of the prosecutrix. Neither was the ossification test conducted nor was the Radiologist examined for providing the X-ray report. In addition, the doctor, in her cross examination has very categorically accepted the fact that she has not written the age of the prosecutrix in her medical papers on account of fact that the age can only be verified by the Radiologist.

8. Counsel for the appellant also referred to the statement of PW-3, the prosecutrix, so as to show that the relationship between the two was a consensual relationship and that it was not a case of rape or a case where the appellant is said to have forcibly ravished the prosecutrix. The prosecutrix in her examination in chief at paragraph 3 has admitted the fact that since the appellant assured her of marrying, she had not informed anybody about the incident. The appellant further referred to the cross examination of prosecutrix wherein she has accepted the fact that the appellant and his family members were ready for the marriage with the prosecutrix. Likewise, she has also accepted the fact that she had also given in writing in favour of the appellant for the purpose of getting him bail and that in the bail proceedings, the father of the prosecutrix had given in writing that the prosecutrix in the instant case was a major. In paragraph 10 of her statement, she has also accepted that she used to meet the appellant voluntarily and since the dispute between the parties could not be resolved before the Panchayat meeting only then report was lodged.
9. Appellant further referred to the statement of mother of the prosecutrix Janki Bai, PW-4, who has accepted the fact that since she is an ignorant and illiterate lady, she was not aware of the age of the prosecutrix. The appellant further referred to the evidence of PW-9, the Investigation Officer, who in his examination in paragraph 12 has accepted that there is no document/records available so far as the date of birth of the prosecutrix is concerned. Neither was the date of birth of the prosecutrix entered into Kotwari register. Thus, for all the aforesaid

reasons, the appellant submitted that the case of the prosecution has not been properly proved and established, therefore, the judgment of conviction is not sustainable and the same deserves to be set aside/quashed and the appellant is liable to be acquitted from the charges.

10. On the other hand, learned counsel appearing for the State opposes the appeal on the ground that there is no reason to disbelieve the prosecutrix. It is settled position of law that in case of rape, it is the statement of prosecutrix which has paramount importance. The statement of prosecutrix itself is sufficient to establish the fact that on the pretext of marriage the appellant is said to have maintained physical relationship with the prosecutrix and subsequently refused to marry her. It was also argued that the evidence of PW-1, Dr. Rama Tiwari, clearly shows that she had perused the X-ray report so as to reach to the conclusion that the prosecutrix was below 16 years of age. The statement of prosecutrix alone is good enough for conviction of a person in case if the statement inspires sufficient confidence and there is no reason to disbelieve the statement of the prosecutrix. Thus, the case of the prosecution has been proved beyond all reasonable doubts and the judgment of conviction of the appellant does not call for any interference and prayed for rejection of the appeal.
11. Having considered the rival contentions put forth on either side, the point of issue for consideration before this court are only (1) whether there has been sufficient evidence brought by the prosecution to establish that the prosecutrix was a minor or not and (2) whether the

relationship between the appellant and the prosecutrix was a consensual relationship or was it a case of the appellant forcibly ravishing the prosecutrix.

12. So far as the age of the prosecutrix is concerned, the sole evidence which has come on record is the X-ray plates of the prosecutrix (Ex. P/2 to Ex. P/4) where the doctor who had taken the X-ray is said to have given a report of the prosecutrix being aged between 11 to 14 years of age. Apart from X-ray report, there is no other material gathered by the prosecution to ascertain the age of the prosecutrix. The mother of the prosecutrix has stated before the court that on account of illiteracy and ignorance she does not remember the date of birth of the prosecutrix. The Father of the prosecutrix has not been examined before the court below. The X-ray plates have not been proved by a Radiologist. It has been proved by the gynecologist i.e. PW-1 who has only examined the prosecutrix so far as rape is concerned. The evidence of PW-1 does not speak as to on what basis the findings is given as regards the prosecutrix being of the age between 11 to 14 years. There is no evidence to corroborate the x-ray plates exhibited during the course of trial so as to conclusively hold that the age of the prosecutrix was less than 16 years.
13. On one hand prosecution witness as well as the prosecutrix and her mother admit of there being no document to establish the actual date of birth of the prosecutrix, on the other hand there is admission of the prosecutrix in her cross examination that while the bail application of the appellant was being pressed before the court below, her father had

given in writing that prosecutrix was a major. It was also admitted that the appellant and his family members were willing for the marriage between the prosecutrix and the appellant. Similarly, the Investigating Officer, PW-9, also has accepted the fact that he could not collect any material pertaining to the age of the prosecutrix. Thus, only on the basis of the x-ray plates without the evidence of the Radiologist it would be difficult to ascertain that the prosecutrix was less than 16 years of age. Thus, the findings of the trial court to that extent is therefore bad in law and not sustainable.

14. Now as far as the other issue whether the appellant had consensual relationship with the prosecutrix or not, if we look into the statement of the prosecutrix herself, she has clearly stated that since the appellant had assured marrying her, she did not make any complaint in respect of the physical relationship that the two had together. It is further an established fact from the evidence that the relationship between the two continued for a considerable period of time. It was not the stray incidence of appellant having ravished the prosecutrix or forcibly had sexual intercourse with the prosecutrix, but in due course of time they had sexual intercourse on repeated occasions and yet the prosecutrix did not think it proper to inform any of the relatives or to raise any objections.
15. Another vital factor from the evidence which is revealed is the admission on the part of the prosecutrix in respect of family members of the appellant and the appellant being ready for marriage with the prosecutrix. Likewise, there is also admission on the part of the

prosecutrix in her cross examination that her father had given in writing before the court below at the time of bail of the appellant stating that she is major and that he is also ready for the marriage of his daughter i.e. prosecutrix with the appellant.

16. Last but not the least, in paragraph 10 of her statement, she has also accepted that she used to meet the appellant voluntarily and since the dispute between the parties could not be resolved before the Panchayat meeting only then report was lodged.

17. All these facts clearly gives sufficient indication in respect of there being a cordial relationship between the appellant and the prosecutrix. All the more for the reason that the house of the appellant was just in front of the house of the prosecutrix across the road. Thus, this court has no hesitation in reaching to the conclusion that the relationship between the appellant and the prosecutrix was a clear consensual relationship.

18. This view of the court stands fortified from the decision of Supreme Court in case of Dinesh Jaiswal Vs. State of Madhya Pradesh, reported in 2010(3) SCC 232 and also decision of this court in case of Nathuram Vs. State of Chhattisgarh, reported in 2015 (1) CGLJ 430.

19. Thus, once when it is not conclusively established by cogent evidence in respect of age of the prosecutrix being a minor and the fact that the evidence of the prosecutrix herself reveals of consensual relationship between the appellant and the prosecutrix, in the opinion of this court, the conviction of the appellant for the offence under Section 376(1) IPC is not proper, legal and justified and the same is not sustainable and

deserves to be and is accordingly set aside.

20. The appeal is allowed. The appellant is acquitted of the charges. He is in jail. He be released from jail forthwith, if not required in any other case.

Sd/-
(P.Sam Koshy)
Judge

inder

