

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1147 of 2012**

- Bhujbal Yadav S/o Bhakunda Yadav, aged about 26 years, R/o Nursury Nagar, Korba, P.S. Kotwali, Korba, District Korba (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through P.S. Kotwali, Korba District Korba (C.G.)

---- Respondent

For Appellant.	-	Shri Jeet Patel, Advocate.
For Respondent	-	Shri Vaibhav Goverdhan, Panel Lawyer.

Hon'bel Shri Justice Pritinker Diwaker**Judgment On Board****16/03/2016**

This appeal arises out of the judgment of conviction and order of sentence dated 28.07.2012 passed by the Sessions Judge, Korba, District Korba, in S.T. No.52/2011 convicting the accused/appellant under Sections 363, 366 and 376(1) IPC & sentencing him to undergo R.I. for one year and pay fine of Rs.1000/-, R.I. for two years and pay fine of Rs.1000/- & R.I. for seven years and pay fine of Rs.2000/- with default stipulations respectively.

02. Brief facts of the case are that on 02.05.2011 FIR (Ex.P/3) was lodged by Leela Vishwakarma (PW/2)-mother of prosecutrix alleging in it that on 10.04.2011 when the prosecutrix was all alone in the house, the accused/appellant allured her, took her along with him to Korba and both of them started living there in a rented premises. It is also alleged that during this period, the accused/appellant had forcible sexual

intercourse with the prosecutrix and upon return of the prosecutrix on 02.05.2011, the report was lodged. Based on this report, offences under Sections 363, 366 and 376(1) IPC were registered against the accused/appellant. On 03.05.2011 the prosecutrix was medically examined by Dr. Veena Agrawal vide Ex.P/4 who opined that intercourse was done with the prosecutrix but no definite opinion regarding duration could be given. After investigation, charge sheet was filed against the accused/appellant under Sections 363, 366 and 376(1) IPC and charges were also framed accordingly.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 08 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 went along with the accused/appellant of her own and lived with him for about a month in a rented premises without offering any protest, 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 and admission register Ex.P/12-A does not give conclusive date, thus, merely on the basis of admission register, it

cannot be said that on the date of commission of offence she was minor;

(iii) that the medical report Ex.P/4 of the prosecutrix does not support the prosecution case.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the accused/appellant is strictly in accordance law and there is no infirmity in the same.

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

08. Prosecutrix (PW/1) has stated in her evidence that on 10.04.2011 the accused/appellant allured her and took her with him to his house. Thereafter, he took her to his sister's house situated at village Dadar saying that he would marry her and had sexual intercourse with her. She has further stated that she lived at village Dadar for about 20 days and thereafter she was dropped by the accused/appellant at her parents house. She also states that after reaching home she narrated the entire incident to her mother, the report thereof was lodged in the police station and she was medically examined by the Doctor. In cross-examination she has stated that a tattoo was scribbled on her hand mentioning 'K' and 'B', however, it means Kiran and Brihaspati and 'B' denotes Brihaspati not Bhujbal i.e. the name of the accused/appellant. However, she never disclosed her name as Brihaspati to anyone. In her entire statement she has not stated anything about her age.

09. Leela Vishwakarma (PW/2)-mother of prosecutrix has stated that prosecutrix is about 15 years of age, however, she is from her first husband Dindayal, who has expired. She has further stated that on the date of incident prosecutrix was all alone in the house and when she

returned home after three days she found prosecutrix to be missing and the day she returned, FIR was lodged. She has also stated that second name of her daughter is Brihaspati. P.R. Patel (PW/3) is a Patwari who prepared spot map vide Ex.P/2. Dr. (Ms.) Veena Agrawal (PW/4) who medically examined the prosecutrix vide Ex.P/4 has stated in her evidence that secondary sexual characters of the prosecutrix were fully developed, prosecutrix was having full teeth and no injury was found on her body. This witness, on internal examination of the prosecutrix, found multiple tears in hymen membrane, all were healed old more than one week; two fingers easily entered her vagina. She has further stated that generally a person having 28 teeth comes between 12 to 18 years of age. According to this witness, she has not referred the prosecutrix for her ossification test and as per her examination, the prosecutrix could be between 15 to 16 years of age but no definite opinion regarding her age could be given. Anju Chelak (PW/5) is a Investigating Officer who has duly supported the prosecution case and has also seized school register (Ex.P/12). Mlara Ekka (PW/6)-headmaster of school has proved the admission register Ex.P/12-A recording the date of birth of prosecutrix as 10.05.1996. However, she has stated that the date of birth was recorded on the basis of disclosure made by mother and father of the prosecutrix and no document whatsoever in this regard was demanded from the parents. She has further stated that the entry in the admission register was not made by her and there could be variation in the same. Paras Ram Sahu (PW/7) has turned hostile. Dr. Raghuraj Singh (PW/8) who medically examined the accused/appellant vide Ex.P/18 has stated that the accused/appellant was capable of performing sexual intercourse.

10. Close scrutiny of the evidence makes it clear that the prosecutrix

accompanied the accused/appellant on 10.04.2011 and lived with him till 02.05.2011 at village Dadar and had sexual intercourse with the accused/appellant without offering any protest there-against and in these circumstances it can be said that she was a consenting party to the act of the accused/appellant. Though as per the document of Ex.P/12-A date of birth of the prosecutrix appears to be 10.05.1996, there is no legally admissible evidence in that regard making the said date of birth acceptable because the entry in the school register was made on the basis of the information given at the time of her admission but even the mother of the prosecutrix has not deposed authentically about her exact date of birth. Merely on the basis of document Ex.P/12-A which is an admission register, it cannot be held that she was minor on the date of commission of offence especially when the author of the said document has not been examined by the prosecution nor there is conclusive piece of evidence as to on what basis the date of birth was recorded in the admission register. Even the prosecutrix in her evidence has not stated about her age and her mother also does not appear to be trustworthy in respect of deposing the age of the prosecutrix. The lady Doctor Ms. Veena Agrawal (PW/4) who had examined the prosecutrix has stated that her secondary sexual characters were fully developed and she could be between 15 -18 years of age.

11. In view of the aforesaid factual discussion and the material available on record, this Court is of the considered opinion that the prosecution has not been able to prove its case beyond reasonable doubt and the trial Court thus has gone wrong in ignoring the fact that for such a long span of time prosecutrix went on to allow the appellant to have sex with her without offering any resistance on her part and it is

when she was dropped by the accused/appellant at her parents house, she chose to disclose the incident. The Court below has also fallen in legal error by holding the prosecutrix minor though there is no legally admissible evidence to prove the same. Thus, in these circumstances the appellant has every entitlement to receive the benefit of doubt.

12. Accordingly, the appeal is allowed. Judgment impugned is hereby set aside. Accused/appellant is acquitted of the charges levelled against him. As the appellant is reported to be in jail, he be set free forthwith if not required in any other case.

Sd/-

(Pritinker Diwaker)

JUDGE