

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 401 OF 2001

Sunil Kumar Verma, S/o Bhuklu Singh Verma, aged 25 years, R/o Village Bainji, Thana Bemetara, District Durg.

... Appellant

Versus

The State of Chhattisgarh, through District Magistrate, Durg (C.G.)

... Respondent

For Appellant	:	Mr. Vishnu Koshta and Mr. Shobhit Koshta, Advocates.
For Respondent-State	:	Mr. Ashok Swarnakar, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

C A V Judgment

Reserved on : 02.12.2016

Delivered on : 05.12.2016

1. The Appellant stands convicted and sentenced to undergo R.I. for 7 years and to pay fine of Rs.3000/- with default sentence of R.I. for 1 year under Section 376(1) of IPC, as ordered on 20.4.2001 by the Additional Sessions Judge, Bemetara, District Durg, in Sessions Trial No. 213/1998.
2. Case of the prosecution in brief is that the Prosecutrix (PW-1) on 7.5.1998 lodged an FIR at Police Station, Bemetara, District Durg, which was registered as Crime No.115 of 1998, alleging that the Appellant had on the pretext of marriage maintained physical relationship with her for over a year prior to the date of lodging of the FIR. That, in between, she had also got conceived and gave birth to a male child and insisted the Appellant for marrying her and when he refused to marry, she was compelled to lodge the FIR. After investigation, charge-sheet was filed and the matter was put to trial before the Court of Additional Sessions Judge, Bemetara, where the case was registered as Sessions Trial No. 213 of 1998.

3. During the trial, the prosecution has examined as many as 14 witnesses. In defence, the Appellant did not examine any witnesses. After the conclusion of the trial, the Sessions Judge vide impugned judgment found the Appellant to be guilty of having committed the offence under Section 376(1) of IPC and after convicting the Appellant for the said offence, sentenced him for the period as mentioned in the first paragraph of this judgment, which gave rise to the filing of the present appeal.

4. Assailing the impugned judgment of conviction and sentence, learned Counsel for the Appellant, Shri Koshta, submits that it is a case where the Court below has wrongly appreciated the legal proposition settled in this regard by a series of judgments, in the factual matrix of the present case and, therefore, the impugned judgment deserves to be set aside. According to Shri Koshta, the evidences which have come on record clearly suggest that it is a case of the Prosecutrix being a consenting party and it also gives an element of doubt of the Appellant being falsely implicated. He submits that though they are 14 witnesses examined on behalf of the prosecution, the material witnesses relevant for the consideration of the issues involved in the case are only four witnesses, i.e., PW-1 the Prosecutrix, PW-2 Dhansingh, brother-in-law of the Prosecutrix in whose house she used to live, PW-3 Amritbai, neighbour of the Prosecutrix in whose house the Appellant is said to have had physical relationship with the Prosecutrix for over one year period, and PW-4 Kumari Bai who is the wife of PW-2 Dhansingh and the sister of the Prosecutrix. Shri Koshta, further submits that it is a case where from none of the witnesses examined before the Court below could it be gathered that the Appellant had at any point of time compelled, forced or threatened the Prosecutrix for having physical relationship with him.

5. Counsel for the Appellant took the Court through the entire deposition of the Prosecutrix where from the inception it clearly reflects that she had willingly had physical relationship with the Appellant inasmuch as, as regard the first instance when they had had physical relationship, the Prosecutrix stated that the moment the Appellant had caught hold of her hand she had asked him that in the event anything happens whether he would accept her, and the Appellant having accepting to keep her as his wife she then proceeded to have physical relationship with him. That, the Prosecutrix further in her deposition also stated that she had been frequently meeting with the Appellant in the house of PW-3 Amrit Bai, one of the neighbours and a friend of the Prosecutrix. That, she further had deposed that she used to voluntarily visit the house of PW-3 Amrit Bai whenever she would come to know about the presence of the Appellant in the house of PW-3 Amrit Bai.

6. Another aspect which Shri Koshta tried to bring to the attention of the Court was that it is alleged that the Prosecutrix in between got conceived and given birth to a male child who after some time had expired, but during the period when she was pregnant and also immediately after the birth of the child and also after the death of the said child, she did not lodge a complaint against the Appellant for not performing marriage with her and she continued to have relationship with him. At this juncture, Shri Koshta laid heavy emphasize on the fact that the Prosecutrix was already married to one Taran of Village Bahera and, therefore, since she was already married there was no question of the Appellant assuring promise to marry her.

7. Shri Koshta, further submits that the possibility cannot be ruled out that since the Prosecutrix liked the Appellant very much as she had stated in her statement also that she still loves the Appellant therefore in order to

force the Appellant to marry her, she has falsely implicated him in the instant case. It was further contended by the Counsel for the Appellant that that the statement of the Prosecutrix further reveals that on all the occasions when she allegedly had had physical relationship with the Appellant it was at the house of the third person, i.e., PW-3 Amrit Bai, and that the Appellant has never had physical relationship allegedly outside the house of PW-3 Amrit Bai, which is highly improbable and hard to believe. Shri Koshta submitted that it could also be a case where PW-2 Dhansingh, brother-in-law of the Prosecutrix, might have had a physical relationship with the Prosecutrix and in order to save him (PW-2) from the castigation for the said offence they decided to falsely implicate a third person whom she also liked. That, the said possibility also cannot be ruled out.

8. It was further contended by Shri Koshta that the case of the prosecution has also not been supported so far as the Prosecutrix to be a minor is concerned. Shri Koshta submits that the medical evidence shows that the age of the Prosecutrix was around 17 years and that the judicial pronouncements clearly stipulate that the difference of age being two years on either side the benefit of which should always go in favour of the accused, and adding two years with the 17 years of age of the Prosecutrix, as has been found by the Doctor, she undoubtedly would be a major and, therefore, it cannot be said to be a case where the physical relationship, if at all, if the Appellant had with the Prosecutrix, was with a minor. It is further contended by Shri Koshta that in addition to the said piece of evidence as regards the age of the Prosecutrix, the prosecution had produced Exhibit P-9, which is a birth certificate of one Ishwari, as the proof of age of the Prosecutrix, but the same is not acceptable for the reason that there is a discrepancy in the said birth certificate so far as the name of the mother is concerned and, therefore, the said document

becomes doubtful. For all these reasons, Counsel for the Appellant prayed for the setting aside the impugned judgment of conviction and sentence and for the acquittal of the Appellant of the charge leveled against him.

9. Shri Swarnakar, learned Counsel for the State, opposing the appeal however submits that it is a case where the Prosecutrix has been ravished by the Appellant on the pretext of marriage. The State Counsel also submitted that it is a case where even if the argument of the Counsel for the Appellant of there being a consensual sexual relationship to be accepted but it is of no consequence as the Prosecutrix admittedly during the said relevant period when the Appellant is said to have had maintained the physical relationship with her, was a minor. Shri Swarnakar refers to Exhibit P-9, birth certificate of the Prosecutrix, where the date of birth is said to be 16.10.1982 and accordingly one year before the date of lodging of the FIR i.e., 7.5.1998 she would be somewhere of 15 years of age, as such she was below 16 years of age at the time of occurrence. In addition, the State Counsel refers to the birth certificate which has been proved by PW-11 Vijay Seth, the Investigating Officer, and submits that there is no reason why to disbelieve the statement of the Prosecutrix and the Investigating Officer. That in a case where the allegation is that of rape it is the statement of the prosecutrix-victim which is of paramount importance and in the instant case the Prosecutrix herself has come up before the Court and has stated that she was promised of marriage by the Appellant while having physical relationship and, therefore, the judgment of conviction and sentence passed by the Court below cannot be said to be bad in law or infirm in any manner, and thus he prayed for the rejection of the appeal.

10. Having considered the rival contentions put forth on either side and on perusal of the record what clearly reflects is the undisputed fact of the

complaint being lodged on 7.5.1998. The incident is said to be that of the Prosecutrix having a physical relationship with the Appellant for a period of more than one year prior to the lodging of the FIR and that during the said period for about 6-7 times the Appellant is said to have had sexual intercourse with the Prosecutrix. It is also alleged that during this period the Prosecutrix had also got conceived and had given birth to a male child who had later died. As per the statement of the Prosecutrix herself she was already married to one Taran of village Bahera. Another aspect which is reflected from the deposition of the Prosecutrix is the fact that all the time when the Appellant is said to have had sexual intercourse with the Prosecutrix it was in the house of PW-3 Amrit Bai. In her evidence, PW-3, Amrit Bai has totally denied the contentions of there being any relationship of the Appellant with the Prosecutrix or, for that matter, they ever had any sort of meeting or mating in her house. So far as the birth certificate, Exhibit P-9, is concerned, the statement of PW-14 Laxminarayan, the Head Constable, clearly reflects that the register on the basis of which the said birth certificate was issued reflects the mother of the child born as Sukhbat, whereas in the instant case the mother of the Prosecutrix has been examined as PW-9 before the Court and her name is Ganeshiya Bai. Thus, there is a great element of doubt in respect of the birth certificate being that of the present Prosecutrix herself. Likewise, if we look into the deposition of PW-13 Dr. S.A. Mandge who had conducted the ossification test, on the basis of the said ossification test he has assessed the age of the Prosecutrix to be around 17 years of age.

11. In *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir & Others*, AIR 1982 SC 1297, it was held in paragraph 9: “that the margin of error in age ascertained by radiological examination is two years on either side.”

12. In **State of M.P. v. Narendra Kumar Haridas Deshlahare, 2002 (2) M.P.L.J. 399**, the Madhya Pradesh High Court, relying on the aforesaid decision of the Supreme Court in **Jaya Mala** (supra), held as follows :

“8. In view of the above pronouncement and law laid by the Supreme Court the finding on age reached by the learned trial Judge that the prosecutrix was between 14 to 16 years is merely an approximation and two years margin on either side could be given. The prosecution, therefore, has failed to conclusively prove that the prosecutrix was below 16 years of age.

9. If she was above 16 years of age, had carried on love affair with the accused, eloped with her for marriage and had sexual intercourse with him for number of days, the reasonable inference is that she consented to cohabit with the accused. The accused was unmarried young boy aged 24 years and his act of sexual intercourse with the prosecutrix with her consent cannot be held to be an offence under Section 376 of the Indian Penal Code.”

13. In **Alamelu & Another v. State, AIR 2011 SC 715**, the Supreme Court held as under:

“45. ...Undoubtedly, the testimony of victim of sexual assault stands at par with testimony of an injured witness, and is entitled to great weight. Therefore, corroboration for the testimony of the victim would not be insisted upon provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence...”

14. In **K.P. Thimmappa Gowda v. State of Karnataka, AIR 2011 SC 2564**, the Supreme Court in paragraphs 12 & 13 held as follows :

“12. In criminal cases, the rule is that the accused is entitled to the benefit of doubt. If the court is of the opinion that on the evidence two views are reasonably possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

13. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there

was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape.”

15. In view of above, this Court has no hesitation in reaching to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt so far as the Prosecutrix being minor.

16. Now when the Prosecutrix cannot be said to be a minor, and accordingly accepting her to be a major if we look upon her deposition it clearly reflects that she had stated that about two years back when she had gone to the house of PW-3 Amrit Bai the Appellant who was present in the house of PW-3 had caught hold of her hands and she had asked him whether in the event if something happens he would keep her or not and he accordingly had assured her for keeping her as his wife and then she permitted him to have physical relationship with her. She has also accepted the fact that during this period for about 2 years she had had sexual intercourse for about 6-7 times and each time it was in the house of PW-3 Amrit Bai. It is further revealed that in between the Prosecutrix had also gone to her matrimonial home and where she stayed for a couple of months and it is only after she had come from the matrimonial home, she had delivered the male child. Another aspect which is reflected from the statement of the Prosecutrix is, she has clearly admitted the fact that whenever she came to know about the presence of the Appellant in the house of PW-3 Amrit Bai she would somehow manage to go there and that is how they used to maintain the physical relationship. Lastly, in her cross-examination also she admits that she still loves the Appellant and wants to stay with him. All these facts stated by the Prosecutrix in her deposition emphatically make it clear that it was a case where the Prosecutrix had voluntarily had physical relationship with the Appellant and there was no element of any sort of coercion, threat or force used upon the Prosecutrix.

Further, it also reflects from the deposition that it is not a case where the Appellant had tracked down the Prosecutrix each time to have sexual intercourse rather it is the other way round where the Prosecutrix on each time she came to know about the presence of the Appellant in the house of PW-3 Amrit Bai she would somehow go to the house of PW-3 and make physical relationship with the Appellant.

17. Another vital factor which cannot be brushed aside is the fact that the Prosecutrix was already married to one Taran of village Bahera and that even if her statement is to be believed, in her statement she states that in course of having relationship with the Appellant she had also gone to her matrimonial home and where also she had stayed for a couple of months and even then there was no complaint either by the Prosecutrix or by family members of the husband of the Prosecutrix so far as her getting conceived from the Appellant or not getting conceived from her husband. All these factors led to a great element of doubt on the prosecution story.

18. In the light of the factual matrix of the case and the judicial pronouncements referred to in the preceding paragraphs, this Court has no hesitation in reaching to the conclusion that, firstly the medical evidence and other evidences which have come on record do not clearly establish the fact the Prosecutrix at the relevant of time was a minor. Similarly, the evidences which have come on record clearly establish the fact that it was the Prosecutrix who had gone to the Appellant on each occasions to have physical relationship and therefore it is a clear case where the Appellant and the Prosecutrix, if at all, if they had any physical relationship it was consensual between the two. Another aspect which cannot be lost sight of is the fact that the Prosecutrix admittedly was married and even during the course when she had had physical relationship with the Appellant she had

gone to the matrimonial home and stayed there for a considerable period of time.

19. Thus, in view the factual background of the present case and in the light of the judicial pronouncements referred to herein above, the impugned judgment of conviction and sentence cannot be sustained and the conviction of the Appellant thus is held to be bad in law and deserves to be and is accordingly set aside.

20. The Appellant is on bail. His bail-bonds shall remain in operation for a period of six months from today in view of provisions contained in Section 437-A of CrPC.

21. The appeal accordingly stands allowed.

Sd/-
(P. Sam Koshy)
Judge