

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 791 of 2012

- Deepak Godwani S/o Vashudev Godwani, aged about 21 years, R/o Banspara, Sindhi Colony , P.S. Mohan Nagar , Distt. Durg C.G.

---- Appellant (in jail)

Versus

- State Of Chhattisgarh Through - Station House Officer, P.S. Gudiyari, Distt. Raipur C.G.

---- Respondent

For Appellant:
For Respondent:

Dr. Shailesh Ahuja, Advocate
Mr. V. A. Goverdhan, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

C A V Judgement

28/04/2016

1. This appeal arises out of the judgment of conviction and order of sentence dated 24.8.2012 passed by the 6th Additional Sessions Judge, Raipur (CG) in S.T. No.252/2011 convicting the accused/appellant under Sections 363, 366 & 376 of the Indian Penal Code (for short 'the IPC') and sentencing him to undergo R.I. for 2 years & fine of Rs.250/-; R.I. for 4 years & fine of Rs.250/- and R.I. for 7 years & fine of Rs.500/-, with default stipulations, respectively.
2. Case of the prosecution, in brief, is that on 7.3.2011 missing report (Ex.P-14C) was lodged by Suraj Bhoi (PW-3)- father of the prosecutrix, alleging in it that on that day when the prosecutrix did not return from the school, she was searched but her whereabouts could not be traced out. During the course of investigation, it came to light that the prosecutrix was taken by accused/appellant on the pretext of marrying her and therefore

FIR (Ex.P-11) for the offence punishable under Sections 363, 366 & 376 IPC was registered him. It is also the case of prosecution that on 20.3.2011 the prosecutrix returned home and thereafter recovery panchnama was prepared vide Ex.P-6 on 22.3.2011 and her statement was recorded in which she has stated that accused/appellant took her to different places and during this period he committed forcible sexual intercourse with her. The prosecutrix was medically examined vide Ex.P-1 on 22.3.2011 by Dr. Neeta Kumhare (PW-1) who did not notice any external or internal injury on her body and found her habitual to sexual intercourse. Accused/appellant was also medically examined by Dr. Santosh Bhandari (PW-9) who gave his report of Ex.P-13 opining him to be fully capable of having sexual intercourse. On completion of investigation, charge sheet was filed against accused/appellant for the offence punishable under Sections 363, 366 & 376 IPC followed by framing of charges by the Court below under the aforesaid sections.

3. The prosecution examined as many as 11 witnesses to prove the charges. Statement of accused/appellant was recorded under Section 313 of Cr.P.C. in which he abjured his guilt and pleaded innocence & false implication. His defence was that he and prosecutrix were in love with each other, which was not acceptable to the parents of the prosecutrix.
4. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment, convicted & sentenced the accused/appellant as described above.
5. Learned counsel for accused/appellants submits that;
 - the prosecutrix was major and in love with the appellant and only because of this relationship, she eloped along with the appellant and had no reason to register any protest.

- there is no legally admissible evidence showing the prosecutrix to be minor on the date of incident.
 - the appellant had developed physical relation with the prosecutrix only after performing marriage with her, therefore, it cannot be said the offence of rape has been committed by the appellant.
6. On the other hand, supporting the impugned judgment learned counsel for the State submits that the prosecution has discharged its onus in establishing beyond reasonable doubt that the accused/appellant has committed forcible sexual intercourse with the prosecutrix. He further submits that date of birth of prosecutrix is 28.11.1996, which is evident from the document marked as 'Article-A' i.e. Class 6th mark sheet of the prosecutrix. This apart, from the birth certificate issued by the Registrar, Birth & Death, Raipur also it is evident that date of birth of the prosecutrix is 28.11.1996 and the same being a public document does not require any further proof. He further submits even if it is presumed that the prosecutrix was the consenting party, but the same becomes immaterial in view of the fact that she was minor at the relevant time.
 7. I have heard learned counsel for the parties and perused the material available on record.
 8. Dr. Neeta Kumhare (PW-1) is the witness who medically examined the prosecutrix vide Ex.P-2. According to this witness, she did not notice any mark of internal or external injury on the body of prosecutrix and found her habitual to sexual intercourse.
 9. Narendra Pandey (PW-2) is the Patwari who prepared the spot map vide Ex.P-3.
 10. Suraj Bhoi (PW-3) is the father of prosecutrix and he has stated that date of birth of the prosecutrix is 27.11.1996. He has further stated that he had

lodged missing report of the prosecutrix and on 20.3.2011 the accused/appellant phoned his landlord and asked him to pick-up the prosecutrix from the railway station. He has further stated that he was informed by the prosecutrix that she was raped by the accused/appellant. This witness has also proved the document Article-A i.e. school certificate in which date of birth of prosecutrix is mentioned as 28.11.1996. He has denied that the prosecutrix was 18 years of age at the time of incident and he is telling incorrect date of birth of the prosecutrix.

11. The prosecutrix (PW-4) has stated that on the fateful day when she was going to her school, the accused/appellant met her on the way, took her on the motorcycle to Urja Park and from there to his sister's house situated at Gudhiyari. Thereafter he took her to Rajnandgaon, Itarasi and Bilaspur where he kept her in a rented house for about 5-6 days and during this period he had developed physical relation with her. Thereafter, she was taken to Dongargarh where accused/appellant performed marriage with her. She has further stated that ultimately the accused/appellant left her at Bhilai Railway Station from where she had called her parents and came back home. In the cross-examination she has stated that twice she failed in the school. She admits that she used to talk with accused/appellant over telephone. She further admits that she started liking him. She has further admitted that she roamed around various places with the appellant. She has further stated that had the appellant would have been of her caste, her parents would have agreed for their marriage.

12. Sheela Bhoi (PW-6) is the mother of the prosecutrix and she has stated that the prosecutrix was between 15 & 16 years of age. She has further stated that after the birth of prosecutrix, they have obtained birth certificate

from the Municipal Corporation, Raipur. She has also produced the original birth certificate, which is Article –B.

13. Smt. Manju Bhoi (PW-7) is the aunt of the prosecutrix and stated about the missing of prosecutrix.
14. Dr. Santosh Bhandari (PW-9) is the doctor who medically examined the accused/appellant and opined that he was capable of performing sexual intercourse.
15. Tukan Lal (PW-11) is the person who registered the missing report.
16. Jugal Kishore Sen (PW-12) is the investigating officer and he has duly supported the prosecution case.
17. In the present case the primary defence of accused/appellant is that the prosecutrix was major, accompanied him willingly and entered into physical relationship out of her free will, desire and consent. It is admitted case that on 7.3.2011 the prosecutrix was taken by the accused/appellant firstly to his sister's house at Gudhiyari and from there to Rajnandgaon, Itarasi and Bilaspur where they stayed for about 5-6 days and during this period, on several occasions, the accused/appellant had committed sexual intercourse with the prosecutrix. Therefore, the question for consideration, on which the fate of this case hinges, is the age of the prosecutrix from which it could be discerned as to whether she was minor on the date of incident or not.
18. In order to prove that the prosecutrix was minor at the relevant time, the prosecution had produced Class 6th progress card (Article-A) & birth certificate (Article B-C) of the prosecutrix issued by the concerned official in discharge of his official duties. Both these documents show the date of birth of prosecutrix as 28.11.1996. True it is that both the aforesaid documents have not been proved by the prosecution in the manner as

required under the law i.e. by examining its author etc., but so far as the birth certificate (Article B-C) issued by statutory authority under the provisions of the Registration of Births & Deaths Act, 1969 is concerned, it is an established principle that the entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act and it is not necessary for the prosecution to examine its author. Further, it would prevail over an entry made in the school register etc., particularly, in absence of any proof that same was recorded at the instance of the guardian of the victim. According to PW-3-Suraj Bhoi, father of prosecutrix, the prosecutrix was born in the house, he had given the information to the Municipal Corporation concerned regarding birth of his daughter and accordingly the birth certificate (Article B-C) was issued by the Corporation. Statement of PW-6 Smt. Sheela Bhoi, mother of prosecutrix, also goes to show that birth certificate of the prosecutrix was got prepared from the Municipal Corporation. Thus the statements of parents of the prosecutrix regarding her age were corroborative of the entries made in the birth certificate (Article B-C). Accordingly, the evidence on record clearly establishes the fact that on the date of occurrence the age of the prosecutrix was 14 years & 5 months i.e. below 16 years of age. In this situation, it can safely be held that the accused/appellant had kidnapped or abducted the prosecutrix from the lawful guardianship with intent to force or compel her for marriage, illicit intercourse etc.

19. Coming to the next argument of counsel for the accused/appellant that the accused/appellant had physical relations with the prosecutrix only after their marriage. Clause "sixthly" of Section 376 IPC clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. Thus, once it is found that, the

prosecutrix was below 16 years at the relevant time or on the date of occurrence, it necessarily follows, by operation of law, irrespective of the fact that the prosecutrix consented for sexual intercourse, the person responsible for committing sexual intercourse will be liable to be held guilty for offence under Section 376 IPC. The fact of consent will make no difference to that situation, just as in the present case. In the present case the prosecution has established that the prosecutrix was less than 16 years of age at the relevant time or on the date of occurrence and she was subjected to sexual intercourse by accused/appellant before performing marriage and subsequent thereto, therefore even if the prosecutrix had willingly developed sexual relationship with the accused/appellant, the same has no relevance because of her age being less than sixteen years. Resultantly, the order passed by the trial Court against the accused/appellant for having convicted him for offence under Section 376 IPC cannot be interfered with.

20. Keeping in view of the fact that counsel for the appellant has not been in a position to point out any special circumstance to reduce the sentence to the period already undergone by him, his submission in that regard has no force and the same is hereby turned down. Further, the minimum jail sentence of seven years has been prescribed under the law for the offence under Section 376 IPC and therefore also this Court cannot reduce the sentence to the minimum one surpassing legal requirement.

21. Having thus scrutinized the evidence on record, as well as, the submissions of learned counsel on both sides, I am of the opinion that there is no reason to interfere with the findings of guilt recorded against the accused/appellant by the trial Court for the offences punishable under Sections 363, 366 & 376 IPC and the same are hereby affirmed.

22. In the result, the appeal fails and is dismissed. Since the appellant is already inside, no further order regarding surrender etc. is needed.

Sd/-

(Pritinker Diwaker)

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