

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1133 of 2012**

1. Yadram Rajwade @ Gannu S/o Hirday Lal, aged about 19 years, R/o Village Katolipara, Police Station Baikunthpur, District Korea (CG).
2. Shiv Shankar Singh S/o Roopnarayan, aged about 23 years R/o Village Katolipara, Police Station, Baikunthpur, Distt, Korea (CG).

---- Appellants**Versus**

State of Chhattisgarh, through Station House Officer, Police of Police Station Baikunthpur, Distt. Korea (CG).

---- Respondent

For Appellant

Shri D.N.Prajapati, Advocates. and Shri Vasant Zokarkar.

For respondent/State

Shri Ashish Shukla, Govt. Advocate.

Hon'ble Shri Justice P. Sam Koshy**Judgment on Board****06/12/2016**

1. The appellant No.1 stands convicted for the offence under Sections 363 and 376 IPC and have been sentenced to undergo RI for 7 years with fine of Rs.1000/- for each offences with default stipulation, whereas the appellant No.2 stands convicted for the offence under Section 363 IPC and have been sentenced to undergo RI for 7 years with fine of Rs.1000/- with default stipulation, vide judgment dated 18.10.2012 passed by the Special Judge, ST & SC (Prevention of Atrocities) Act, Baikunthpur, Distt. Korea, in Special Sessions Case No.15 of 2010.
2. The case of the prosecution in brief is that, an FIR was lodged on 20.04.2010 at around 10 PM in the night at the behest of PW-1, prosecutrix (Minor), alleging that the appellant No.1 is said to have

informed the prosecutrix, who had gone to the house of her Badi Maa, that her mother is calling her. When she left the house of her Badi Maa to her parental home, en route it is said that appellants caught hold of the prosecutrix and forcibly made her sit on the motorcycle and took her without her consent to the house of sister of appellant No.1. It is said that the appellant No.2 after dropping them in the house of sister of appellant No.1 went back and the appellant No.1 under the threat of her life made her stay the night over there. There it is said that the appellant No.1 in the night had raped her twice. However, in the morning at 5 AM she could manage to escape from the clutches of the appellant and ran towards her house. Enroute, she found Chhakke Lal, ex-Sarpanch of the village and took his assistance and also called upon her parents about the incident over the mobile phone of Chhakke Lal. Thereafter, her parents came and took her and later lodged an FIR.

3. Thereafter, investigation was conducted and based on the investigation, the case was registered against the appellants and they were subjected to trial before the court below for the offence under Sections 297, 363 and 376 IPC as also under Section 3(2)(5) of the ST & SC Act, 1989 and the matter was put to trial.
4. The prosecution, in all, has examined as many as 20 witnesses and on behalf of defence, two witnesses were examined.
5. After conclusion of trial, the court below finally found the appellant No.1 guilty of having committed the offence under Section 376 IPC and appellant No.2 for the offence under Section 363 IPC, and sentenced them for the period as stated in the first paragraph of this judgment,

leading to filing of this appeal.

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. It is a case where the appellant has been falsely implicated in the case and that the prosecution has not been able to establish its case beyond all reasonable doubts. It is also contended that the case of the prosecution is highly improbable. According to appellants, there are numerous contradiction and omissions in the statement of the prosecutrix as also other prosecution witnesses which give rise to great element of doubt on the prosecution story. Thus, the impugned judgment of conviction cannot be sustained and the same deserves to be set aside/quashed.
7. Counsel for the appellant also contended that it is a case where there is an established inimical relationship between the family of the appellant No.1 and the maternal uncle of the prosecutrix which has led to the filing of the false complaint. It is also submitted that the prosecution in the instant case has not been able to establish beyond all reasonable doubts the fact that the prosecutrix was a minor or not. Likewise, it is also submitted that the medical evidence which have come on record, would suggest that the case of the prosecution has not been proved medically also as the doctor who had examined the prosecutrix could not give a concrete opinion of the prosecutrix being subjected to sexual intercourse neither have the medical evidence been able to establish from the clothes which were seized on either side to be positive for

confirming the act of sexual intercourse.

8. In addition, lastly it was also contended by the counsel for the appellants that many of the prosecution witnesses themselves have not supported the case of prosecution, inasmuch as, the father of the prosecutrix, PW-2, Devidayal Singh, himself has not supported the case of the prosecution and for all aforesaid lapses and omissions in the prosecution story, the judgment of conviction is not sustainable and the same deserves to be set aside/quashed.
9. 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 and in the instant case the prosecution as well as other witnesses examined during the course of trial have sufficiently brought enough material so as to reach to the conclusion that the offence of rape did take place on the night of 19.04.2010.
10. The appellants are said to have forcibly taken the prosecutrix from the house of her Badi Maa and made her forcibly sit on the motorcycle and took her to the house of sister of appellant No.1 where he has committed rape with minor girl. The law is by now well settled that even in case where minor evidence does not support the prosecution case, that alone would not be a vital factor for grant of acquittal to the accused. 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.

11. Lastly it is submitted that, if we look into the complaint lodged before the police station on 20.04.2010 and the statement of the prosecution witnesses examined during the course of investigation and corroborating the same with the statement of the prosecution witnesses examined during the trial, it would clearly support the case of the prosecution as there is not much contradiction and omissions or any strong reasons assigned for disbelieving the prosecution witness. Thus, the case of the prosecution has been proved beyond all reasonable doubts and the judgment of conviction of the appellants does not call for any interference and prayed for rejection of the appeal.
12. Having considered the rival contentions put forth on either side and on perusal of record, before appreciating the evidence it would be relevant to first discuss certain undisputed facts. The FIR was lodged on 20.04.2010 at around 13-14 Hours alleging an act of gang rape committed by the appellants herein on the previous day i.e. 19.04.2010 at around 10 PM at night.
13. So far as the age of the prosecutrix is concerned, what is undisputed fact is that, the prosecutrix has not been subjected to ossification test. The only document which has been relied upon to assess the age of the prosecutrix is her mark sheet of Class 10th which again would not be a conclusive document to establish the actual age of the prosecutrix. The prosecution in the given facts of the case in addition ought to have also conducted an ossification test to ascertain the age of the prosecutrix.
14. In some what similar circumstances, the Supreme Court in case of

State of Madhya Pradesh v. Munna reported in **2016 (1) SCC 696**, has held that, the High Court has correctly reached to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt the girl being less than 16 years of age at the time of incident, and therefore, the High Court has rightly presumed the girl to be more than 16 years of age.

15. In the aforesaid referred judgment of the High Court the Prosecution had relied upon the mark-sheet of 9th standard with no other supportive evidence and ossification test also was not matching, which led to the High Court holding that there was no sufficient evidence to establish that the Prosecutrix was below 16 years. The Supreme Court again in one of the recent decision in case of **State of Madhya Pradesh v. Anoop Singh** reported in **(2015) 7 SCC 773** while dealing with the issue of determination of age of the Prosecutrix referring to the judgment of the Supreme Court in case of **Mahadeo v. State of Maharashtra** reported in **(2013) 14 SCC 637** in paragraph 14 held as under :-

“**14.** This Court in the case of Mahadeo Vs. State of Maharashtra (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“**Rule 12(3):** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

- (i) the matriculation or equivalent certificates, if available;

and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

16. If we look into the aforesaid guidelines and law laid down by the Supreme Court in the case of Mahadeo (supra) it would clearly reflect that mark-sheet produced by the prosecution during the course of the evidence does not meet the requirement as laid down in the preceding paragraph. As per the Supreme Court in event of absence of any authentic document pertaining to the date of birth Prosecutrix can be subjected to ossification test for determination of the age. However, in the instant case the prosecution has not got the ossification test

conducted on the Prosecutrix. In the absence of which the date of birth relied upon by the prosecution can not be accepted to be authentic piece of evidence for determining the age of the Prosecutrix.

17. Similar view has also been expressed by the Supreme Court in the case of **Alamelu And Another v. State** reported in **(2011) 2 SCC 385**.

18. In view of the authoritative decision of the Supreme Court in the case of Mahadeo (supra) and the guidelines laid therein this Court has no hesitation in reaching to the conclusion that the prosecution has failed to establish the fact that the Prosecutrix was a minor.

19. Now, coming to the merits of the case if we look into the F.I.R that was lodged by the Prosecutrix it reflects that the complaint which she had made at the time of lodging of the F.I.R. she had said that when she was at her aunts place Appellant No. 1 Yadram had come and informed her about her mother calling and she immediately left for her house. However in the statement it reflects that Yadram has already reached to the road awaiting the Prosecutrix to come. The time of the incident alleged was around 10:30 pm yet the Prosecutrix in the night of darkness could recognise the motorcycle of Shiv and the brand name and model name also, which is very surprising. Another aspect which she had cited at the time of lodging of F.I.R that after forcing her to sit on the motorcycle Appellant No.1 Yadram with one hand tried to close her mouth and with other hand he was able to caught hold of both her hands, this also is very unusual in nature. Next it was contended that the Appellants first had taken her to the house of the brother-in-law of Appellant No.1 Yadram where his brother-in-law was staying with his

mother, yet she did not raise any alarm or try to seek help from those present in the house and she stayed there for the whole night. The Appellants though under alleged threat had sexual intercourse with her on two occasion on the same night yet there was no sign of protest on her part. Further, she had said that after dropping them at Yadram's brother-in-laws house Shiva had left but in her cross statement she had said that Shiva stayed back the night over there. Which again shows discrepancy and contradiction on her statement.

20. Another surprising feature which is hard to believe and also appears to be improbable theory for the fact that both in the F.I.R and in the Court statement the Prosecutrix states that the house where she had visited i.e. her aunt's house was very close by her house and there were other houses also nearby from the place from where she was abducted by the Appellants. Neither did she try to raise an alarm calling for the attention of the neighbours nor has she stated that there weren't any public on the road which again is hard to believe firstly for the reason that in the neighbourhood itself there were her other relatives house and there was a function going on, therefore there was bound to have guests and relatives also and possibility of many persons to be outside the road cannot be ruled out. Yet nobody had seen the forceful abduction by the two appellants.

21. Likewise, conduct of the Prosecutrix after she allegedly escaped from the clutches of the appellants in not taking shelter to any of the nearby houses or informing anybody enroute till she met Ex. Sarpanch of the village Champajhar, Chhakkela also creates great element of doubt in

her version.

22. Another aspect which cannot be brushed aside is the fact that the Prosecutrix had been taken to Chirguda and from where she reached Champajhar. Admittedly there were 5-6 colonies (Basti) in between, there also a Police Station in between yet the Prosecutrix does not inform anybody in these colonies nor does she report to the police authorities. The evidence which have come on record as per statement of the Prosecutrix within these colonies as well as police station which was on the road side itself, thus there was no chance for her to miss sight of seeing any of these destinations. Further in the cross-examination the Prosecutrix herself submits that she does not know the route to Champajhar via fields yet at the same time she submits that she had travelled Champajhar through the fields which again by itself is contradictory. It is hard to believe that a person who was sitting on back of the Prosecutrix could have caught hold of her two hands with his one hand and the other hand was used for choking her mouth from raising alarm. The Said submission of the Prosecutrix is really hard to believe. In addition to the aforesaid discrepancy, omission and contradiction and the doubt which has arisen is the evidence which have come record is the statement of the Prosecutrix herself that there was a land dispute between Hirday Lal, father of the Appellant No. 1 and Harinarayan, brother in law of the PW-2 father of the Prosecutrix.

23. For all the aforesaid infirmities and discrepancies in the prosecution case, the version of the prosecution particularly the Prosecutrix becomes doubtful and also does not inspire sufficient confidence to

believe statement of the Prosecutrix. Nor does the statement of the father of the Prosecutrix, PW-2 match with the statement of the Prosecutrix in its entirety. There are material contradiction and omission in the deposition of the prosecution evidence.

24. Thus, for the foregoing reasons it can not be said that the prosecution has been able to prove its case beyond all reasonable doubts and hence the conviction of the Appellants can not be sustained and the impugned judgment thus deserves to be and is accordingly set aside. The appellants are acquitted of the charges levelled against them.

25. Accordingly, the Appeal stands allowed.

Sd/-

(P. Sam Koshy)
JUDGE