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HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 227 of 2006**

- Rewa Yadav S/o Shri Jagwan Yadav, aged about 24 years, resident of Tamori, Thana and District Mahasamund (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through The District Magistrate, Raipur (C.G.)

---- Respondent

For Appellant. - Shri Awadh Tripathi, Advocate.
For Respondent - Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice R.C.S. Samant****Judgment On Board****Per Pritinker Diwaker, J****19/10/2016**

This appeal arises out of the judgment of conviction and order of sentence dated 25.02.2006 passed by the Special Judge (constituted under Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989)), Raipur in Special Sessions Trial No.103/2004 convicting the accused/appellant under Sections 363, 366, 376-1 IPC, Sections 3(1)(xii) and 3(2)(v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act') & sentencing him to undergo R.I. for three years with fine of Rs.500/-, R.I. for five years with fine of Rs.1000/-, R.I. for seven years with fine of Rs.1000/-, R.I. for three years with fine of Rs.500/- and imprisonment for life with fine of Rs.1000/- respectively, plus default stipulations.

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02. Brief facts of the case are that on 23.06.2004 FIR (Ex.P/9) was lodged by Dev Singh Diwan (PW/6) – father of Malti Diwan (PW/3) alleging in it that on 20.06.2004 his daughter Malti Diwan (PW/3) had gone to attend the nature's call but when she did not return, he came to know that prosecutrix (PW/1) was also missing from the said date. It has been further alleged that two boys namely Manoj Sahu and Rewa Yadav (present appellant) of the village are also missing. He has stated that according to him, both Manoj Sahu and appellant Rewa Diwan had taken his daughter Malti (PW/3) and prosecutrix (PW/1) along with them and they have been seen in other village. Based on this, FIR (Ex.P/9) was registered against Manoj Sahu and present appellant Rewa Yadav for the offences under Sections 363, 366-A/34 IPC. On 28.06.2004 prosecutrix was recovered from the company of the appellant, whereas Malti Diwan (PW/3) was recovered from the company of Manoj Sahu. On 28.06.2004 the prosecutrix was medically examined by Dr. Alka Pardal (PW/13) vide Ex.P/16 who found no internal or external injuries and opined that the prosecutrix was habitual for sexual intercourse. For determination of age of the prosecutrix, x-ray was advised by the Doctor, however, no x-ray was done by the Investigating Officer as according to him, there was sufficient evidence in respect of age of the prosecutrix. During the course of investigation, seizure was affected under Ex.P/11 whereby mark-sheet of the prosecutrix is alleged to have been seized showing her date of birth as 13.04.1989 and only un-exhibited photocopy of the same is on record.

03. After investigation, charge sheet was filed against the accused/appellant under Sections 363, 366, 376/34 IPC and Section

3(1)(xii) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, however, while framing the charge the trial Court has framed the charges under Sections 363, 366, 376(1) IPC and Sections 3(1)(xii) and 3(2)(v) of the Act against the accused/appellant.

04. So as to hold the accused/appellant guilty, the prosecution examined as many as 22 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.

05. 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.

06. Learned counsel for the appellant submits as under:

(i) that from the statement of the prosecutrix and other witnesses it is evident that prosecutrix accompanied with her friend Malti Diwan (PW/3), Rewa Yadav (present appellant) and Manoj Sahu and they visited various places during eight days without offering any protest and, thus, it can safely be inferred that she was a consenting party;

(ii) that there is no legally admissible evidence showing the prosecutrix to be a minor;

(iii) that it is not a case of the prosecution that offence was committed by the accused/appellant just because prosecutrix belongs to Scheduled Tribe and the basic ingredients of Sections 3(1)(xii) and 3(2)(v) of the Act are completely missing.

07. On the other hand, supporting the impugned judgment it has been



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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.

08. We have heard learned counsel for the parties and perused the material available on record.

09. Prosecutrix (PW/1) has stated in her evidence that she does not know her date of birth and she can be about 15 years of age. She has stated that she is not aware as to whether her date of birth has been recorded in school register or not. She has further stated that she was living along with her grandparent whereas her parents were living in a different village. She has also stated that on the date of incident when she had gone to attend the nature's call at evening along with Malti Diwan (PW/3), accused/appellant and Manoj Sahu reached there, appellant hold her hand, Manoj hold Malti's hand and they both took them first to Mahasamund from where they went to Mandir Hasoud. This witness also went on to state that they lived in a rented house and during that period she was subjected to rape by the accused/appellant, whereas her friend Malti Diwan (PW/3) subjected to rape by Manoj Sahu. From the cross-examination of this witness, it is apparent that she accompanied the accused/appellant without offering any protest, she roamed around various places and never offered any resistance.

10. Narad Sidar (PW/2) is father of prosecutrix. He has stated that her daughter was forcibly taken by the accused/appellant. In his entire evidence, he has not stated anything about date of birth of the prosecutrix.

11. Malti Diwan (PW/3) accompanied the prosecutrix along with appellant and Manoj. This witness has made almost similar statement

as has been made by Prosecutrix (PW/1). This witness too has admitted that she and the prosecutrix went along with appellant and Manoj at several places and stayed in rented house at Durg.

12. Gajju (PW/4) and Gulab (PW/5) have turned hostile. Dev Singh Diwan (PW/6) is the lodger of FIR (Ex.P/9). Ramashray Diwan (PW/10) has not stated anything specific against the accused/appellant. Santram (PW/11)-Kotwar and Kanti Bai (PW/12)-Sarpanch of village are formal witnesses and Sarpanch has proved the caste certificate of the prosecutrix.

13. Dr. Alka Pardal (PW/13) who medically examined the prosecutrix vide Ex.P/16 has stated in her evidence that on internal examination of the prosecutrix she found hymen membrane teared with healed radial, two fingers easily entered her vagina. She has further stated the prosecutrix was habitual for sexual intercourse and confirmation regarding recent intercourse depends on the report of slides. According to this witness, for determination of the age she has referred the prosecutrix for x-ray.

14. Dr. Rakesh Pardal (PW/14) who medically examined the accused/appellant vide Ex.P/22 has stated that the accused/appellant was capable of performing sexual intercourse. C.S. Thakur (PW/15) is Investigating Officer who has duly supported the prosecution case. Shoaib Ahmed (PW/16) is S.H.O. who helped in the investigation. Mahesh Sinha (PW/17) is Sub Inspector who helped in the investigation. Kanhaiyalal Patel (PW/18) is seizure witness of Ex.P/5, P/11, P/33 and P/34. It is relevant to note that vide Ex.P/11 seizure of mark-sheet has been shown but the same has not been exhibited and only photocopy of it is on record.



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15. Smt. Kamla Mahilang (PW/19) is a seizure witness of Ex.P/28 i.e. admission register in which date of birth of prosecutrix has been shown as 13.04.1989, however, she has admitted the fact that neither she made entry in the admission register nor the same was made in her presence. Similar statement has been made by Roshan Chandrakar (PW/20). S.R. Bhagat (PW/21) is Deputy Superintendent of Police who filed the challan. Dharam Diwan (PW/22) has turned hostile. Bharat Ram Thakur (DW/1) is Patwari. He has stated that Nazri Naksha (Ex.P/1) has not been prepared by him.

16. Close scrutiny of the evidence makes it clear that on 20.06.2004 the prosecutrix and her friend Malti Diwan (PW/3) accompanied the accused/appellant and Manoj Sahu; they visited several places along with them; stayed in a rented house; had physical relation and after eight days they returned to their village, thereafter, the report (Ex.P/9) was lodged. Prosecutrix (PW/1) in her entire statement has not stated that she offered any resistance or protest there-against and, therefore, in these circumstances, it can be safely inferred that she was a consenting party to the act of the accused/appellant.

17. Next question which arises for consideration by this Court as to what was the age of the prosecutrix at the time of incident?

18. Though as per seizure memo (Ex.P/11), mark-sheet of the prosecutrix was seized but the same has not been exhibited by the prosecution and only un-exhibited photocopy of it is on record showing the date of birth of prosecutrix as 13.04.1989. To substantiate the prosecution case, the mark-sheet of prosecutrix ought to have been proved as required under the law but the same has not been proved by it. There is no legally admissible evidence in that regard making the said

date of birth acceptable because as per Kamla Mahilang (PW/19)-Teacher, she does not know whether the entry in the school register was made on the basis of Kotwari or birth certificate. As per this witness, she has not made entry in the school register. Merely on the basis of admission register that too un-exhibited document, it cannot be held that the prosecutrix 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. Moreover, Prosecutrix (PW/1) has categorically stated that she does not know her date of birth and likewise her father has not stated anything in respect of her date of birth.

19. In view of the aforesaid factual discussion and the material available on record, this Court is of the considered opinion that the prosecution has utterly failed to prove the prosecutrix to be a minor at the time of commission of offence. Once there is no conclusive piece of evidence on record holding the prosecutrix to be a minor, question of convicting the accused/appellant under Sections 363, 366 and 376-1 IPC does not arise and he is entitled to be acquitted of the said charges.

20. So far as conviction of the accused/appellant under Sections 3(1) (xii) and 3(2)(v) of the Act is concerned, it is not a case of the prosecution that the prosecutrix was subjected to sexually intercourse by the accused/appellant because of her being a member of Scheduled Tribe. The basic ingredients of the Act are completely missing. Even the prosecutrix has not stated that she was taken by the accused/appellant as she belongs to a particular caste. Taking the cumulative effect of the evidence adduced by the prosecution, we are of the view that the trial

Court while convicting and sentencing the accused/appellant under the said Act has not considered the evidence of prosecution witnesses in its true perspective and thereby erred in law in convicting him under the Act. Thus, in these circumstances the appellant has every entitlement to receive the benefit of doubt.

21. 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 on bail, his bail bonds stand discharged and he need not surrender.

Sd/-

(Pritinker Diwaker)

JUDGE

Sd/-

(R.C.S. Samant)

JUDGE