

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 268 OF 2012

Vijay Navrange, S/o Mansharam Navrange, Aged about 20 years, R/o Village Telasi, PS Palari, Distt. Baloda Bazar (CG).

... Appellant

Versus

State of Chhattisgarh through PS Palari, District Baloda Bazar (CG).

... Respondent

For Appellant	:	Shri Adil Minhaj, Advocate.
For Respondent/State	:	Shri Vinod Tekam, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

CAV JUDGMENT

Reserved on 21.11.2016

Delivered on 30/11/2016

1. The appellant stands convicted for the offence under Sections 363, 366 and 376 IPC and has been sentenced to undergo RI for three years with fine of Rs.200/-, RI for four years with fine of Rs.300/- and RI for seven years with fine of Rs. 300/- respectively with default stipulations vide judgment dated 01.03.2012 passed by the First Additional Sessions Judge, Baloda Bazar, in Sessions Case No.113 of 2011.
2. As per the prosecution, it is a case where the appellant is said to have physically exploited the prosecutrix on the pretext of marriage and initially took her on his motorcycle to different places from where they travelled to Raipur. Thereafter, from Raipur he has taken the prosecutrix to Raigarh by Train. At Raigarh, he has taken a room at the lodge and stayed there for sometime. At Raigarh, it is said that the present appellant has ravished the prosecutrix repeatedly for quite

sometime and all these was done on the pretext of assurance of marriage given to the prosecutrix. Initially, a missing report was lodged by the father of the prosecutrix on 27.04.2010 intimating that his daughter has left the house on previous night of 26.04.2010 at around 9 pm. Later on, an FIR was also lodged in this regard after preliminary inquiry on 03.05.2010 (Ex. P/14). Charge sheet was filed and the matter was put to trial before the 1st Additional Sessions Judge, Baloda Bazar wherein the case was registered as Sessions Case No.113/2011. During the course of trial, the appellant was charged for having committed an offence under Sections 363,366 and 376 IPC.

3. The prosecution, in all, has examined as many as 14 witnesses. There was no witness examined on behalf of the defence.
4. The trial court finally found the appellant to be guilty of having committed an offence under Sections 363, 366 and 376 IPC and sentenced him for the period as enumerated in the first paragraph of this judgment leading to filing of this appeal.
5. 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 prosecution has in fact not been able to establish its case beyond reasonable doubts so as to bring home the offence punishable under Sections 363, 366 and 376 IPC. Counsel for the appellant took the court through the evidence of the prosecutrix and other witnesses and argued that it is a case where the prosecutrix, PW-4, and the present appellant had a love affair and they

had jointly decided to elope from the house and by virtue of the decision taken by them jointly, the prosecutrix had voluntarily left her home without informing any person in respect of their plan of eloping.

6. It was further contended that the prosecution in the instant case has also miserably failed to first establish the fact that the prosecutrix was a minor. According to appellant, the age of the prosecutrix has not been sufficiently proved and established of her being a minor. There was no ossification test conducted and that the only piece of evidence in respect of age of the prosecutrix is the Kotwari register (Ex. P/13-C) brought before the court. The said Kotwari register also cannot be said to have properly proved for the reason that PW-13, Prem Das, who brought the register states that he does not know who has made the entry in the register and on what basis the said entry was made. According to appellant, the evidence to prove the Kotwari register should have been of the person who had made entry in the Kotwari register or the person who had given the information to the Kotwar for such entry to be made in the register. In the absence of either of the two, the deposition of PW-13, Prem Das, is of no consequence and the contents of the register cannot be said to have been effectively proved or established. Referring to statements recorded on behalf of the prosecutrix, it was submitted that there are material contradictions and omissions in the statement of witnesses examined on behalf of the prosecution.
7. The Kotwari register ought to have been proved before the court below as per Section 35 of the Evidence Act. Having not done so, the

document may not be of much relevance. Lastly it was contended by the counsel for the appellant that the fact of forceful rape having been committed by the appellant would have been proved if there had been some medical evidence to support the case of the prosecution, but in the instant case there is no such medical evidence whatsoever to establish the allegation of forceful rape to have been committed by the appellant. Thus, in the light of the facts and circumstances of the case, counsel for the appellant prayed for quashing of impugned judgment of conviction and also sought for acquittal of the appellant from the charges levelled against him.

8. Learned counsel appearing for the State however opposing the appeal submitted that it is a case where in fact the case of the prosecution stands duly proved and established by the prosecution by leading convincing evidence before the court below. According to him, from the statement of prosecutrix itself the case of the prosecution stands fully established. He further alleges that there was no reason whatsoever for the prosecutrix to have falsely implicated the appellant in the present case as there was no inimical relationship of the family of the prosecutrix with that of the appellant, and therefore, the safest inference which could have been drawn is of the appellant to have committed the said offence.
9. It was also submitted by the State counsel that it is a case where the present appellant had access to the house of the prosecutrix on the ground of giving tuition to her. It is a case where the appellant used to take classes at the village school and he also used to visit the house of

the prosecutrix for giving her tuitions. It is a case where the appellant has exploited the prosecutrix taking the benefit of his position of a teacher/tutor of the prosecutrix and under the said position the appellant has physically exploited the prosecutrix. Thus, the case of the prosecution stands effectively proved and established and the impugned judgment does not warrant any interference and prayed for rejection of the appeal.

10. Having considered the rival contentions put forth on either side and on perusal of record what is culled out from the statements and what is to be adjudicated upon by this court is, firstly; whether the act on the part of the appellant was forceful or under any sort of duress, coerce or force or was without the consent of the prosecutrix. Secondly, whether the prosecutrix in the instant case is a minor or major. Whether, the act on the part of the appellant was an act of using force, we have to peruse some evidence adduced by the prosecutrix itself.
11. PW-4, prosecutrix, in her evidence paragraph 4 while narrating the incident submits that on the date of incident i.e. 26.04.2010 she was watching T.V. in her house in the night and when she had gone to the courtyard for relieving herself, it was alleged that the present appellant caught hold of her hand and pulled her out of the courtyard and took her near the pond where there was a motorcycle parked. It is said that she attempted to raise an alarm but the appellant caught hold of her mouth and put a Dupatta in her mouth so that she would not raise an alarm. It was stated by the prosecutrix that she was thereafter forced to sit on the motorcycle and from the said motorcycle she was first taken

to Karmandi. From Karmandi she was taken to Arang and from Arang they went to Raipur and from Raipur they caught hold of train and went to Raigarh. This statement of prosecutrix itself shows that there was no resistance made by the prosecutrix at any point of time. In respect of fact that firstly she was sitting on the backside of the motorcycle, she could have raised an alarm by many ways. Further, it is also the case of the prosecutrix herself that from Raipur they caught hold of train and she was taken to Raigarh. It is beyond any body's comprehension that from Raipur to Raigarh if she was taken by force, it would not have been seen by the fellow passengers. This again leads to an indication of the prosecutrix having voluntarily left the house of her parents and eloped with the appellant. It was further contended that at Raigarh she was confined to a room in the hotel where they stayed together for some time. This statement of the prosecutrix is also unacceptable for the reason that if the prosecutrix was forcefully confined to a room and if she had any desire to escape from the clutches of the appellant, she had so many options of raising an alarm from the hotel which again is missing in the instant case which again gives an indication that it is a case of consent.

- 12.** Another fact which cannot be brushed aside is cross examination of the prosecutrix wherein in paragraph 18 she has admitted the fact that while she was taken for medical examination to Medical College, Raipur, on a query being made by the Doctor, she had informed the Doctor that the present appellant was her Husband and that they had got marriage around 12 days back. In addition, from her cross

examination it is also evidently clear that there have been large number of omissions, improvement and contradictions in her statement. All these facts clearly leads us to the only inference that the prosecutrix in the instant case was a consenting party to the elope.

- 13.** Further, it also establishes the fact that there was no coercion, pressure or force used by the appellant while taking her on his motorcycle to different places and then by Train to Raigarh. Thus, the offence under Section 363 IPC which is for kidnapping is not made out. Likewise, it also does not have the necessary ingredients of abducting or inducing a woman to compel her to marriage, as the prosecutrix nowhere in her statement has made any such allegations as is required for the constitution of offence under Section 366 IPC.
- 14.** Once it is established by evidence that the prosecutrix had voluntarily gone along with the present appellant and that she had ample opportunity to raise an alarm or to escape from the clutches of the appellant and yet she having not even attempted to raise an alarm or asked any persons to call for help or even remotely tried to escape from the clutches of the appellant, hence the offence under Section 376 IPC also would not be made out as the necessary ingredients to bring home the offence within the definition of rape as defined under Section 375 IPC is totally missing.
- 15.** On the aforesaid factual background, now the only issue which is left for this court to consider is whether the prosecutrix on the date of commission of offence was a minor or not?

- 16.** It would be relevant at this juncture to refer to the decision of Supreme Court in case of Birad Mal Singhavi Vs. Anand Purohit, reported in AIR 1988 SC 1796, wherein the Supreme Court dealing with the issue of method by which entries made in the public record could have been proved, referring to Section 35 of the Indian Evidence Act. In paragraph 15 it has been held as under :

“15.....Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoying by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoying by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.....”

- 17.** Relying upon the aforesaid principles of law laid down, the Supreme Court again in case of Alamelu and another Vs. State, represented by Inspector of Police, reported in AIR 2011 SC 715, while dealing with facts similar to the present case, in paragraph 38 & 40 has held as under :

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex. P/16 and the certificate issued by PW-8 Dr. Gunasekaran, Radiologist, Ex. P/4 and Ex. P/5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer

certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.....

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.”

- 18.** It is also trite at this juncture to refer to decision of Supreme Court in case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, reported in 2003 (8) SCC 745, wherein the Supreme Court had observed as under:

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

- 19.** The Division Bench of this High Court in case of *State of Chhattisgarh Vs. Dipak Kumar & Another*, reported in 2013 (1) CGLJ 353 (DB), relying upon the ratio of law laid down by the Supreme Court in case of *Alamelu* (Supra) has taken a similar view. Likewise, again in case of *Suresh Nishad Vs. State of Chhattisgarh*, reported in 2013 (2) CGLJ 435, the co-ordinate Bench of this High Court had re-iterated the principles of law laid down by the Supreme Court in case of *Alamelu* (Supra).

- 20.** Keeping in view the ratio of law laid down in the aforesaid cases, if we look into the facts of the present case, firstly no ossification test was conducted, secondly; the only piece of evidence was the Kotwari register. The person who has made the entry in the Kotwari register was not examined. The person who had given information for the entry to be made in the Kotwari register has also not been examined. The father and mother of the prosecutrix have not been able to give the exact date of birth of the prosecutrix. The medical evidence also does not support the case of the prosecution. Thus, 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 at the time of incident.
- 21.** So far as the judgment relied upon by the State counsel in case of State of Madhya Pradesh Vs. Anoop Singh, reported in 2015 (7) SCC 773 is concerned, the facts of the said case was entirely different as in that case, the prosecutrix was subjected to ossification test and also there was more than one document which reflected date of birth unlike the facts of the case in hand. Thus, the judgment relied upon by the State counsel is distinguishable on its own facts.
- 22.** Thus, for the foregoing reasons, this court is of the opinion that since the age of the prosecutrix being a minor has not been established by the prosecution, the benefit of which shall have to be given to the appellant. Once when there is a finding of a consensual relationship and the prosecutrix herself voluntarily going along with the appellant to different places, the offence charged against the appellant is not proved

or established and the judgment of conviction passed by the court below convicting the appellant for the offence under Sections 363,366 and 376 IPC is not proper, legal and justified.

- 23.** Accordingly, the appeal is allowed. Judgment of conviction dated 01.03.2012 is set aside. The appellant is acquitted of the charges under Sections 363, 366 and 376 IPC. The appellant is reported to be in jail. He shall be released forthwith, if not required in any other case.

Sd/-
(P. Sam Koshy)
Judge