

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 316 of 2013**

Goukaran Yadav S/o Mohna Yadav Aged About 22 Years R/o Village
Bendarchi, PS Thankhamharia, Distt. Durg C.G.

---- Appellant

Versus

State Of Chhattisgarh Through The PS Thankhamharia, Distt. Durg
C.G.

For appellant	:	Mr. Aditya Khare, Advocate
For Respondent/State	:	Mrs. Shobha Kashyap, Dy. Govt. Adv.

Hon'ble Shri Justice Chandra Bhushan Bajpai**Judgment on Board****20/12/2016**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 19-10-2012 passed by the Special Judge, Durg in Special Case No. 10/2011 whereby and whereunder learned trial Court after holding the appellant guilty for kidnapping the P.W. 1 minor prosecutrix (name not mentioned) from the lawful custody of her parents in order to compel her illegally for illicit intercourse and thereafter for committing rape with the said prosecutrix, the trial Court convicted him under Sections 363, 366 and 376 of the Indian Penal Code (in brevity 'IPC') and sentenced him to undergo RI for 3 years, 5 years and 7 years along with fine sentence of Rs. 2,000/-, Rs. 3,000/- and Rs. 5,000/-, in default of payment of fine to further undergo additional RI for 1 month, 2 months and 3 months respectively with a direction to run all the substantive jail sentences concurrently and with a further direction of set off for the period already undergone by him.
2. Conviction is impugned on the ground that without there being an iota of evidence, learned Court below has convicted and sentenced the appellant as aforementioned and thereby committed

illegality.

3. As per case of the prosecution, on 7-11-2010 after the parents noticed for missing of P.W. 1 aged about 14 years, missing person No. 5/10 was registered at the Police Station Thankhamhariya. During inquiry the prosecutrix was recovered from the accused/appellant on 14-12-2010. Police sent the prosecutrix for MLC. P.W. 9 Dr. Rajshri Devghar noticed after examination no external or internal injury, hymen old torn and gave no definite opinion for recent intercourse. She gave her report Ex. P-33. Police recorded statement of the witnesses including the prosecutrix under Section 161 of the Cr.P.C. wherein the prosecutrix stated that she accompanied the accused/appellant due to his pretext of love and marriage and walked for about 25 km thereafter near forest of Bhoramdev he committed sexual intercourse with her. Thereafter the accused/appellant took her to Katghora via Bilaspur and at Katghora also he committed sexual intercourse and thereafter she accompanied him in bus for Bemetara. At Bemetara bus stand, she was recovered by her father and the police people. Police also collected the school certificate regarding the age of the prosecutrix. As per P.W. 4 Pradeep Kumar Kosle, date of birth of the prosecutrix was 18-5-1996. Ossification test of the prosecutrix was also conducted. P.W. 6 Dr. A.K. Sahu after ossification test opined that the prosecutrix was aged about 15 to 16 years. During investigation, the accused was also arrested and examined. P.W. 8 Dr. R.P. Sharma gave report about competency of the accused for committing sexual intercourse. His report is Ex. P-31. After completion of the investigation, charge sheet was filed before the Judicial Magistrate First Class, Saja, Distt. Durg who registered the

same as Criminal Case No. 150/2010 and committed the same vide committal order dated 3-3-2011. Learned Special Judge received the case and conducted trial. The accused/appellant was charged for the offence under Sections 363, 366 and 376 of the IPC and Section 325 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in brevity 'Act of 1989').

4. In order to prove the guilt of the appellant, the prosecution examined 9 witnesses. Statement of the appellant was recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication in the crime in question.
5. After affording opportunity of hearing to the parties, learned trial Court acquitted the accused/appellant of the charge framed under Section 325 of the Act of 1989 and convicted and sentenced the appellant as aforementioned.
6. I have heard learned counsel for the parties and perused the record of the trial Court.
7. Learned counsel for the appellant vehemently argued that he is not contesting instant criminal appeal against judgment of conviction under Section 363, 366 and 376 of the IPC, he is also not contesting the judgment of sentence passed against the appellant under Section 363 and 366 of the IPC and also the fine sentence awarded under Sections 363, 366 and 376, IPC. He is confining his argument only on quantum of substantive jail sentence under Section 376, IPC wherein the appellant has been sentenced for RI for 7 years. Till date, the appellant has served RI for 6 years and 6 days. The incident is about more than 6 years old. The appellant was first offender with no criminal antecedent, he is resident of

same village, known to the prosecutrix and he was aged about 19 years and as the incident is prior to substitution of Criminal Law (Amendment) Act, 2013 for substitution of Section 376, IPC with effect from 3-2-2013 as per proviso of the then existing sub-section (1) of Section 376, the Court may for adequate and special reason to be mentioned in the judgment impose a sentence for a term less than 7 years. Learned counsel draws attention of this Court regarding MLC report of the prosecutrix Ex. P-33, also draws attention of this Court on ossification test conducted by P.W. 6 Dr. A.K. Sahu regarding the age of the prosecutrix and also argued that looking to the tender age of the accused/appellant who was just 19 years of age at the time of incident almost a year elder than the age of his juvenile, and as he already has remained 6 years and 6 days in jail till date, he may be given an opportunity to remain in the society, he will not commit any offence in future. The accused/appellant was a labour by profession earning his bread anyhow hence entire facts may be considered and he may be sentenced to the period already undergone by him.

8. Per contra, learned counsel for the State opposed the arguments advanced and submits that the prosecutrix undisputedly was below age of 18 years at the time of incident hence the Court below rightly convicted him for kidnapping of prosecutrix from the lawful guardianship of her parents, hence the appeal may be dismissed on all counts.
9. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.
10. Learned counsel for the appellant is not contesting the conviction part of the judgment under Section 363, 366 and 376, IPC and

sentence part of Section 363 and 366 of IPC and also fine sentence awarded on all the three counts. Even other wise, from perusal of the material available on record, it is clear that the prosecutrix was below the age of 18 years at the time of incident. With this the trial Court has not committed any error while convicting the accused/appellant for the offence hence conviction and substantive jail sentence of the appellant under Section 363 and 366, IPC and the fine sentence on all the three counts require no interference.

11. So far as quantum of substantive jail sentence awarded under Section 376, IPC is concerned, as per existing law prevailing at the time of incident prior to Criminal Law (Amendment) Act for Section 376, IPC the Legislature gave liberty to the Court to impose sentence of imprisonment for a term lessor than 7 years. With this, the minimum sentence may be awarded.
12. Now the question is whether the appellant may be given substantive jail sentence less than 7 years. On due consideration looking to the age of the appellant, he was 19 years old at the time of incident, as per arrest memo Ex. P-27, he was first offender, looking to the ossification test report Ex. P-24, the prosecutrix may be above the age of 16 years, as per para 3 of the cross-examination of P.W. 6 Dr. A.K. Also. Also when we consider the statement of P.W. 1 prosecutrix, after consideration of the entire evidence of P.W. 1, her MLC report Ex. P-33 and the statement of P.W. 9 Dr. Rajshri Devghar, this Court is of considered view that this is a fit case where the appellant may be awarded the sentence less than minimum in the matter for offence under Section 376, IPC. The period already undergone would serve the ends of

justice.

13. Consequently the appeal filed by the appellant is allowed in part. Conviction of the accused/appellant awarded by the trial Court under Section 363, 366 and 376, IPC is hereby affirmed. Fine sentence along with default clause on all the three counts is also maintained. Substantive jail sentence awarded under Section 363 and 366 of the IPC is also affirmed. For offence under Section 376, IPC instead of substantive jail sentence RI for 7 years, the appellant is sentenced to the period already undergone by him.
14. The appellant be released forthwith if not required in any other case subject to his payment of fine sentence. If he does not deposit the fine amount, he shall serve the jail sentence as per default clause mentioned in para 27 of the judgment impugned.
15. The appeal is partly allowed.
16. Registrar (Judicial) is directed to send a copy of this judgment to the trial Court for compliance.
17. Party may also file copy of the judgment before the trial Court.

Sd/-
(Chandra Bhushan Bajpai)
Judge