

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 393 of 2013

1. Nayan Kumar Pradhan S/o Sadanand Pradhan, aged about 19 years, R/o Village Devalgarh , P.S. Basna Distt. Mahasamund C.G.

---- Appellant

Versus

1. State of Chhattisgarh Through - Police Station Basna, Revenue & Civil District Mahasamund C.G.

---- Respondent

For Appellant – Shri Aditya Khare and Shri Manoj Paranjpe, Advocates.

For Respondent – Shri Satish Gupta, Govt. Advocate.

Hon'ble Shri Justice Chandra Bhushan Bajpai
Judgment on Board

01-12-2016

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 23-02-2013 passed by the Second Additional Sessions Judge, Mahasamund, C.G. in Sessions Trial No. 86/2012 whereby and whereunder the learned trial Judge after holding the appellant guilty for kidnapping the minor girl prosecutrix (PW-7) (name not mentioned) from lawful guardianship of her parents with intention to compel her for illicit intercourse and for committing rape without her consent and free will convicted him under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced the appellant to undergo rigorous imprisonment for 4 years, 4 years and 7 years, also to pay fine of Rs.500/-, Rs.500/- and Rs.500/-, in default of payment of fine, to further undergo rigorous imprisonment for two months, two months and two months, with a direction that all the substantive jail sentences shall run concurrently and period of detention from 25-08-2012 till date of the judgment, i.e., 23-03-2013 be set off under the provision of Section 428 of the Code of Criminal Procedure, 1973 (in short 'the Code').
2. Conviction is impugned on the ground that without there being any iota of evidence the Court below convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per the case of the prosecution, when the prosecutrix (PW-7) below the age of 14 years on 18-08-2012 left for school and midway she was returning back for home on account of some illness, the accused/appellant forcibly took her in the motorcycle, took her upto Village Sankara, thereafter, he took her to Raipur by bus, kept her in a house and committed forcible rape for three or four times. Thereafter, when she was taken to take bus for Orissa and as they were standing at the road in a village, the parents of the prosecutrix reached there and she was recovered. Father of the prosecutrix had lodged the First Information Report regarding kidnapping of her daughter before recovery on 20-08-2012 (Ex.-P/9). Basana police registered the matter under Section 363, 366 of the IPC. After recovery of the prosecutrix and after taking necessary consent for internal examination, the prosecutrix was sent for medical examination to Doctor Smt. Tara Agrawal (PW-3) who noticed no any injury over body, hymen was old torn, vagina admitting two fingers easily, she prepared two slides from vaginal swab, sealed and handed it over to the concerned Constable, she also gave MLC report Ex.-P/3. Thereafter, during investigation, evidence of age of the prosecutrix was collected. The accused/appellant was also arrested, he was examined and noticed capable of committing sexual intercourse. The statements of the witnesses were recorded under Section 161 of the Code.

4. After completion of the investigation, charge sheet was filed before the Judicial Magistrate First Class Pithora, who registered the case as Case No.600/12 and committed the same vide order dated 01-12-2012 to the Court of Sessions. The learned Additional Sessions Judge received the case on transfer and conducted the trial. The accused/appellant was charged under Sections 363, 366 and 376 of the IPC.

5. In order to prove guilt of the accused/appellant, the prosecution examined 13 witnesses in all. The statement of the accused/appellant was recorded under

Section 313 of the Code wherein he denied the circumstances appearing against him, pleaded innocence and false implication in crime in question.

6. After affording opportunity of hearing to the parties, the learned Additional Sessions Judge convicted and sentenced the appellant as aforementioned.

7. I have heard learned counsel for the parties and perused the judgment impugned and record of the trial Court.

8. Learned counsel for the appellant after perusal of the entire evidence adduced oral, medical and documentary, would submit that looking to the entire material and the evidence duly proved by the prosecution, he is not contesting the instant criminal appeal regarding conviction part, he is confining himself for the substantive jail sentence awarded under Section 376 of the IPC. As prayed, the accused/appellant was aged about 19 years, recently attained majority, both were residents of same village and looking to the evidence the matter seems to be a case of consent, but as the prosecutrix was below the age of 16 years, her consent though reflecting would be of no relevance, but the age of the accused/appellant is relevant; he is in jail since 4 years, 3 months and 6 days till date, he will not commit any offence in future. He may be granted opportunity to remain in society without committing any offence. The jail sentence awarded may be considered sympathetically as the date of incident is 18-08-2012, the charges were framed on 27-12-2012 and prior to the amendment through the Criminal Law (Amendment) Act, 2013, section 9, for section 376 (w.e.f. 03-02-2013), in the proviso of Section 376(1), the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than seven years and as his case is covered prior to the said amendment as he was charged for the offence committed earlier from the date of amendment, hence his case may be considered sympathetically. The learned counsel also draws attention over relevant facts regarding consent, though not admissible in the present matter as the prosecutrix was below the age of 16

years. Learned counsel would further pray that the appellant may be sentenced properly looking to his age.

9. Per contra, learned counsel for the respondent/State opposed the argument advanced on behalf of the appellant and would submit that any consent of the prosecutrix, if taken for the moment, is not relevant as she was proved to be below the age of 16 years and as the accused/appellant was grown up adult took the prosecutrix without lawful consent from the parents of the prosecutrix and committed sexual intercourse/rape more than once, hence, the sentence awarded by the trial Court is minimum and proper and as such the appeal may be dismissed on both counts.

10. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

11. Minute examination of the evidence makes it clear that at the time of incident, the prosecutrix was below the age of 16 years, with this, her consent if any is of no relevance for the entire incident. As the accused/appellant was charged for the offence prior to the amendment w.e.f. 03-02-2013 and looking to the date of incident which too is 18-08-2012, in the considered view of this Court, provisions of law existed earlier to the amendment w.e.f. 03-02-2013 shall be applicable and according to them, the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence for imprisonment for a term less than seven years.

12. In the present case, the accused/appellant was aged about 19 years, he was the first offender with no any criminal antecedent, he is in jail since 4 years, 3 months and 6 days till date and looking to the other attending circumstances it goes to show that the said kidnapping and entire conduct was not under true intimidation or fear, looking to the age of the accuse/appellant, it would be appropriate to grant him an opportunity, though for the other reasons his case is not worth for consideration. Consequently, looking to the tender age of the

accused/appellant, substantive jail sentence awarded to the accused/appellant under Section 376(1) of the IPC requires interference.

13. Consequently, the instant appeal filed by the accused/appellant is allowed in part. Conviction of the accused/appellant under Sections 363, 366 and 376 of the IPC is hereby affirmed. Fine sentences awarded for all the above penal offences are hereby affirmed; the default sentences awarded in case the fine is not deposited are also hereby affirmed. The substantive jail sentences awarded to the accused/appellant for the offence under Sections 363, 366 of the IPC for rigorous imprisonment for 4 years and 4 years are also affirmed and as the Court below directed to run all the substantive jail sentences concurrently, the substantive jail sentences for above two counts are already served looking to the detention period of the appellant, hence they are affirmed. So far as substantive jail sentence awarded under Section 376 of the IPC is concerned, instead of rigorous imprisonment for 7 years, rigorous imprisonment for 5 years would serve the purpose. Accordingly, the accused/appellant is sentenced rigorous imprisonment for five years under Section 376 of the IPC along with benefit of serving all the substantive jail sentences concurrently as directed by the trial Court. The accused/appellant remained in jail for 4 years, 3 months and 6 days till date. The authorities are directed to serve the appellant remaining sentence awarded by this Court and release the accused/appellant after serving of the sentence awarded by this Court and also after deposition of fine sentence awarded by the trial Court. If fine amount is not deposited, then the authorities are directed to serve the appellant for default part also as directed in para 25 of the judgment of the trial Court dated 23-03-2013.

14. Appeal allowed in part.

Sd/-
(Chandra Bhushan Bajpai)
JUDGE