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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 253 of 2014**

Deepak Chaudhary S/o Mahendra Kumar Chaudhary aged about 21 years, R/o village Gidhapali, thana Basna, District Mahasamund.

---- Appellant**Versus**

State of Chhattisgarh through P.S. Saraipali, District Mahasamund, Chhattisgarh.

---- Respondent**and****Criminal Appeal No. 354 of 2014**

Usha Bariha S/o Vijay Bariha aged about 40 years, residence of ward No.2, Bandhapara, Saraipali, thana – Saraipali Civil & Revenue District Mahasamund, Chhattisgarh.

---- Appellant**Versus**

State of Chhattisgarh through the District Magistrate, Mahasamund, District, Mahasamund, Chhattisgarh.

---- Respondent

For the Appellants	:	Shri Sunil Sahu, Advocate.
For the Respondent/ State:		Shri Neeraj Sharma, Deputy G.A.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****28.11.2016**

1. Since both the appeals arise out of a common judgment, therefore, they are disposed of by the following common judgment.
2. The appeals arise out of a common judgment of conviction and order of sentence dated 26.2.2014 passed by the learned Additional Sessions Judge (F.T.C.), Mahasamund, Chhattisgarh in Sessions Trial No. 38 of 2013, whereby and whereunder the learned Additional Sessions Judge has

convicted appellant – Deepak Chaudhary (Criminal Appeal No. 253 of 2014) under Section 366 of the Indian Penal Code (for short 'the IPC') read with Section 4 of the Prevention of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentenced him to undergo RI for 4 years and RI for 7 years and to pay fine of Rs.500/- on each count, in default of payment of fine, to further undergo RI for two months, respectively, and convicted appellant – Usha Bariha (Criminal Appeal No. 354 of 2014) under Sections 366 and 368 of the IPC read with Section 4/17 of the POCSO Act and sentenced her to undergo RI for 4 years, RI for 7 years and RI for 7 years and to pay fine of Rs.500/- on each count, in default of payment of fine, to further undergo RI for two months, respectively.

3. The case of the prosecution, in brief, is that the prosecutrix (PW-1) was acquainted with appellant – Deepak Chaudhary (Cr.A. No. 253 of 2014) and appellant – Usha Bariha (Cr.A. No.354 of 2014). On 02.01.2013, at about 7:00 pm, appellant – Usha Bariha called the prosecutrix (PW-1) for some domestic work at her residence where appellant – Deepak Chaudhary was already present. Thereafter, appellant Usha Bariha left the prosecutrix inside her house and went out bolting the door from outside. Appellant – Deepak Chaudhary proposed the prosecutrix that he wants to marry her and wants to have a physical relation with her to which she refused. On that, appellant Deepak Chaudhary forcibly disrobed her and without her consent and willingness committed sexual intercourse with her. After the incident, he threatened the prosecutrix that if she narrates about this incident to anybody, then he will kill her. The prosecutrix came back to her house and informed about the incident to her mother Tulsi Bai (PW-3). She was scared from the threat given by appellant Deepak Chaudhary, therefore, after 22 days of the

incident, i.e., on 24.1.2013, she went to Police Station Saraipali along with her mother - Tulsi Bai (PW-3) and friend – Sarita Yadav (PW-2) for lodging the report. On her report, First Information Report (Ex. P/1) was lodged. The prosecutrix and appellant Deepak Chaudhary were medically examined. Two spot-maps were prepared, one by the Investigating Officer vide Ex. P/3 and the other by the Revenue Officer vide Ex. P/4. During the investigation, it was found that the prosecutrix was below 18 years of age. In this respect, her school transfer certificate (Article – A1) was seized vide seizure memorandum Ex. P/5 in which her date of birth is mentioned as 01.04.1995. Vaginal slides of the prosecutrix were prepared and her pubic hair and clothes were preserved by the examining doctor which were seized vide Ex. P/6 and the seized articles were sent for FSL examination but there is no FSL Report on the record. On completion of the investigation, appellant – Deepak Chaudhary (Criminal Appeal No. 253 of 2014) was charge-sheeted for the offence punishable under Section 366 of the IPC read with Section 4 of the POCSO Act and appellant – Usha Bariha (Criminal Appeal No. 354 of 2014) was charge-sheeted for the offence punishable under Sections 366 and 368 of the IPC read with Section 4/17 of the POCSO Act. Both the appellants denied the charges, pleaded innocence and demanded trial. The prosecution examined as many as 8 witnesses and the defence examined 3 witnesses. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against them, the appellants pleaded innocence and false implication. After giving opportunity of hearing and leading evidence to the prosecution and the defence, the impugned judgment has been passed by which the appellants have been convicted and sentenced as mentioned above. Hence, these appeals.

4. The grounds taken in both the appeals are that the prosecution has failed to prove the age of the prosecutrix, that she was below 18 years of age on the date of incident and, therefore, the provisions of POCSO Act are not attracted to the case. The school transfer certificate though exhibited yet it is not proved by the prosecution. FIR was lodged after delay of 22 days, but no cogent explanation has been offered for the inordinate delay in lodging the FIR. Apart from this, in her deposition, the prosecutrix has admitted that she was in love with appellant – Deepak Chaudhary and wanted to marry him and there was no sexual relationship between them, but this statement has not been appreciated by the trial Court. The medical evidence does not support the prosecution case. On these grounds, it is urged that the trial Court has erred in giving the finding of conviction against the appellants.

5. Learned counsel for the appellants submitted, that the statement of the prosecutrix (PW-1) does not inspire confidence. She has changed her statement frequently. On the other hand, the delay of 22 days in lodging the FIR has not been explained satisfactorily. For these reasons, the evidence of the prosecutrix (PW-1) is not trustworthy. The other witnesses who have been examined by the prosecution have not supported the case of the prosecution. The medical evidence is also not indicative about the sexual offence alleged to having been committed with the prosecutrix. The defence witnesses, in their deposition, have contradicted the prosecution version and have successfully established, that the prosecution has falsely implicated the appellants in the case. Therefore, the appellants are entitled to benefit of doubt and they deserve to be acquitted of the charges framed against them.

6. On the other hand, learned State counsel submitted, that the prosecution has established its case beyond reasonable doubt. It is very clearly established that the age of the prosecutrix was below 18 years on the date of incident and the statement of the prosecutrix alone is sufficient for holding the appellants guilty in the case. Learned State counsel submitted that there is no scope for interference with the impugned judgment.

7. After hearing both the parties, and perusing the material on record, the questions arising for determination in these appeals are firstly, whether the age of the prosecutrix was below 18 years or not and secondly, whether the conviction against the appellants is sustainable or not. To arrive at a finding, the evidence adduced before the trial Court is perused and analyzed. Regarding the first question, it was alleged by the prosecution that the prosecutrix was below 18 years of age on the date of incident i.e. 2.1.2013 and her date of birth has been shown as 1.4.1995. Sewakram Dhruv, ASI (PW-7), who seized the school transfer certificate (Article A-1) vide seizure memorandum Ex. P/5, has stated that on this certificate the date of birth of the prosecutrix is recorded as 1.4.1995. On this ground, it is argued that the evidence of Article A-1 is not admissible. The admissibility of Article A-1 may be under question but the trial court in the impugned judgment in paragraphs 11 and 12 has given a finding that the statement of Sewakram Dhruv (PW-7) is not challenged in cross-examination. On the other hand, in her deposition, the prosecutrix (PW-1) has stated that her age was below 18 years and on her proposal for marriage, appellant – Deepak Chaudhary had said, that they both should wait till the age of the prosecutrix is complete 18 years. No question has been put to Sarita Yadav (PW-2), friend of the

prosecutrix and Tulsi Bai (PW-3), mother of the prosecutrix to rebut the stand of the prosecution. On the suggestion of counsel for defence, Tulsi Bai (PW-3), mother of the prosecutrix, admitted that appellant – Deepak Chaudhary had offered, that when the prosecutrix completes the 18 years of age, he will marry her. It is again admission of the defence that the age of the prosecutrix was below 18 years on the date of the incident. Hence, on the basis of these admissions, it is found that the evidence in proof of age presented by the prosecution was not challenged by the defence. On the contrary, it was admitted and suggestion was given likewise. Hence, the question raised regarding the age of the prosecutrix (PW-1) is not worth consideration.

8. Reliability of evidence of the prosecutrix (PW-1) is a big question. The prosecutrix has stated that on the date of incident, appellant – Usha Bariha came to her residence and called her to her own house where appellant Deepak Chaudhary was already present. Thereafter, appellant – Deepak Chaudhary proposed that he wanted to marry her. On her refusal, he forcibly caught hold her and made physical relationship with her just as husband and wife. In the meanwhile, appellant – Usha Bariha said her not to say anything about the incident due to which she got scared and she did not give any information to her mother but she informed about the incident to her friend Sarita Yadav (PW-2). After two days of the incident, she approached appellant Deepak Chaudhary and asked him to marry her to which appellant Deepak Chaudhary refused. Then she along with her friend and mother went to Police Station Saraipali. In cross-examination, she denied that she had a previous acquaintance with appellant Deepak Chaudhary which is a contradiction on the basis of FIR (Ex. P/1) and her

previous statement (Ex. D/1). She stated that she went for lodging the FIR after 3 - 4 days, but, on suggestion that she lodged the report after 22 days of the incident, she replied that she could not remember it now. Further, on suggestion of the defence, she denied that she had a love affair with appellant Deepak Chaudhary and wanted to marry him. She also denied that appellant Deepak Chaudhary offered that after attaining the age of 18, he will marry her. Further, she admitted that her parents had submitted a written compliant in the office of Superintendent of Police, Mahasamund alongwith an affidavit. Later on, this witness was again cross-examined on another date in which she admitted on suggestion of the defence that she had a love affair with appellant Deepak Chaudhary and wanted to marry him but physical relation between them was never established and there had never been any incident of rape with her. She further admitted that when appellant Deepak Chaudhary refused to marry her, she lodged the report after 20-22 days of the incident. When this witness was again questioned by the court for the correctness of the different versions, she again stated that appellant Deepak Chaudhary committed rape with her.

9. Later on, this witness was again examined by the prosecution and in cross-examination she again changed her statement of admitting the suggestion of defence that she was not summoned by appellant Usha Bariha but she was called by appellant Deepak through telephone. On being questioned in the court, she answered that it was appellant Usha Bariha who had called her at her residence for getting some household work done. Later, on the contrary, she stated that appellant Deepak wanted to meet her and he had called her. Again she answered that it was not Usha who came to summon her. Thus, this witness has not remained consistent

with her statement her examination-in-chief and in cross-examination. Again need for re-examination and re-cross-examination of this witness arose, due to the alteration and changes in charges against the appellants, in which the answers suitable for the defence were obtained from the mouth of the prosecutrix (PW-1), which can be regarded as sufficient to contradict her statement previously given before the court. At one point of time, she stated about forcible sexual intercourse without her willingness and consent and at another point of time she denied the same and again made changes in her statement when questioned by the court. Looking to the quality of the statement of this witness, it cannot be said that her evidence inspires confidence. The delay in lodging the FIR has also not been explained satisfactorily.

10. In the FIR (Ex. P/1), the element of threat is included and that the threat was given to the prosecutrix (PW-1) by appellant Deepak Chaudhary which is an omission in her statement before the court. In the court statement, she stated that after the incident, appellant Usha Bariha asked her not to say anything about this incident to anybody. This is a material contradiction and omission which has to be taken into account and the other witness Sarita (PW-2) has stated that she was informed about the incident on mobile phone by the prosecutrix (PW-1) on 3.1.2013. She was out of village. When she came back on 18.1.2013, the prosecutrix (PW-1) took her to the police station for lodging the FIR. The date mentioned in the statement of this witness is relevant. She got the information one day after the incident and it was after 15 days she came back to Saraipali and met with the prosecutrix. What conspired in between them is not narrated by this witness. It means before arrival of this witness, the prosecutrix (PW-1) had

not determined anything regarding prosecution of the appellants. Tulsi Bai (PW-3), mother of the prosecutrix is a totally hostile witness and not supported the prosecution case, although in cross-examination she admitted that appellant Deepak did wrong with her daughter and for this reason her daughter wanted to marry him. This statement alone does by itself sufficient to support the charges against the appellants.

11. Sewakram Dhruv, ASI (PW-7) and Mahadev Thakur, Inspector (PW-8) have stated regarding the investigative procedures. Dr. Sujata Patel (PW-6), who examined the prosecutrix (PW-1) on 25.1.2013, has stated that the sexual parts of the prosecutrix were well developed and no external injury was found in her body or on private parts. Her hymen had an old tear. She opined vide her report (Ex. P/9) that no opinion can be given regarding recent sexual intercourse. Vaginal slides were prepared. Pubic hairs were preserved and the apparels worn by the prosecutrix were also preserved. This evidence is not suggestive of any forcible sexual intercourse having occurred with the prosecutrix. Such opinion can be expected in natural course, as the prosecutrix has been examined after almost 23 days of the incident. Hence, this medical evidence does not have a character of circumstantial evidence in support of the prosecution.

12. On analysis of the statements of the witnesses, it is very clear that the evidence of the prosecutrix does not inspire confidence. Hence, it requires corroboration from other evidence. The corroboration from medical evidence is missing. The articles seized during the investigation though were sent for FSL examination yet have not been returned with report. Hence, there is absence of expert report for arriving at conclusion that

incident of rape took place. One key witness is Tulsi Bai (PW-3) to whom the prosecutrix narrated about the incident just after it occurred as per the (FIR Ex. P/1), but in the court statement the prosecutrix (PW-1) has stated in negative that she did not say anything to her mother about the incident. Tulsi Bai (PW-3) has not supported the prosecution any more. Hence, the statement of the prosecutrix does not find corroboration from any of the evidence produced by the prosecution in this case. For this reason, conviction against both the appellants is bad in law.

13. In view of the foregoing, both the appeals are allowed. The impugned judgment of conviction and order of sentence passed by the trial court is hereby set aside and both the appellants are acquitted of the charges framed against them. The appellants are in custody since 25.1.2013. They be set at liberty forthwith after being satisfied by them the requirement of Section 437A of the Cr.P.C.

Sd/-

(Rajendra Chandra Singh Samant)
Judge