

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.722 of 1998**

Loman Gond, S/o Gendram Gond, aged about 19 years, resident of Village Bhaira, Police Station Chhura, District Raipur, M.P. (now Chhattisgarh)

---- **Appellant**

versus

State of Madhya Pradesh (now Chhattisgarh)

--- **Respondent**

For Appellant	:	Shri Ajeet Kumar Yadav, Advocate
For State/Respondent	:	Shri Ravindra Agrawal, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel**Judgment on Board**

5.12.2017

1. This appeal is directed against the judgment dated 12.3.1998 passed in Sessions Trial No.298 of 1997 by the 2nd Additional Sessions Judge, Raipur convicting and sentencing the accused/Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation

2. Case of the prosecution, in brief, is that on 2.4.1997, the prosecutrix (PW5), aged about 16 years, lodged First Information Report (Ex.P5) in Police Station Chhura, District Raipur alleging that on 31.3.1997 at about 8:00 a.m., she sat in a bus to go to school. At that time, the Appellant also sat in the said bus. The Appellant enticed her and took her to Rajim. He took her to Nayapara in Rajim. There, he removed her anklets made of silver and sold. Thereafter, he took her to the house of his grand mother at Mahasamund. There, he committed forcible sexual intercourse

with her. He threatened her of life on being disclosed the same to anyone. Searching for the prosecutrix, her uncle Vijay Kumar (PW7) reached Mahasamund on 1.4.1997. He found her there and took her back to her home. The prosecutrix was medically examined. During investigation, memorandum statement (Ex.P9) of the Appellant was recorded. Vide seizure memo (Ex.P10), a sum of Rs.300/- was recovered from possession of the Appellant. Vide seizure memo (Ex.P12), Dakhil-Kharij Panji (Admission-Transfer Register) (Ex.P13) was seized regarding age of the prosecutrix. On completion of the investigation, a charge-sheet was filed against the Appellant for offences punishable under Sections 363, 366, 376 and 392 of the Indian Penal Code. Charges were framed against him under Sections 363, 366, 376 and 392 of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 12 witnesses. Statement of the Appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the circumstances appearing against him, pleaded innocence and false implication. No witness has been examined in defence of the Appellant.
4. After trial, The Trial Court acquitted the Appellant of the charges framed against him under Sections 363 and 392 of the Indian Penal Code, but convicted and sentenced him under Sections 366 and 376 of the Indian Penal Code as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for Appellant argued that the prosecutrix and the Appellant had a love affair with each other. The prosecutrix was a consenting party. At the time of incident,

she was aged more than 16 years. There is delay in lodging the FIR, but no explanation has been offered therefor. The Appellant has been falsely implicated in the case.

6. Per contra, Learned Counsel appearing for the State supported the impugned judgment.
7. I have heard Learned Counsel appearing for the parties and perused the record with utmost circumspection.
8. Subelal (PW1), Itwari (PW2) and Umendra (PW3) are the witnesses relating to seizure memo (Ex.P1 and P2). Naib Tahsildar J.R. Verma (PW4) is the witness who conducted identification parade of anklets vide Ex.P4. Ex.P4 states that the prosecutrix had identified her anklets and stated that the same belonged to her.
9. Prosecutrix (PW5) has stated that on 31.4.1997, she went to bus stand to go to school. At about 8:00 a.m., a bus came. She sat in the bus. At that time, the Appellant also came there and sat in the bus beside her. On the way, she had to step down at Village Sorit, but the Appellant asked her not to step down there saying that he had purchased ticket for her for journey upto Rajim. She has further stated that both of them stepped down at Rajim. They went to Nayapara on their feet. The Appellant sold her anklets there. From there, he took her to the house of his grand mother at Mahasamund. There, he committed sexual intercourse with her thrice. She has further stated that he had threatened her of life, therefore, she could not refuse him. She has further stated that on 1.4.1997, her uncle Vijay Kumar (PW7) came at Mahasamund and took her back along with him. Thereafter, she lodged the FIR

(Ex.P5). In her cross-examination, in paragraph 12, she has categorically admitted that on the date of incident she herself had gone along with the Appellant. In paragraph 13 of her cross-examination, she has further stated that at Mahasamund, she, the Appellant and the grand mother of the Appellant had slept together in one room in the night of 31.3.1997.

10. Bhagiram (PW6), father of the prosecutrix has stated that the prosecutrix went out of home in the morning to go to school, but did not return home. He has further stated that later on when his brother Vijay Kumar (PW7) took her back from Mahasamund, she told him about the incident.
11. Vijay Kumar (PW7) and Rain Singh (PW8) have supported the above statement of Bhagiram (PW6) and stated that both of them had gone to Mahasamund and taken the prosecutrix back from the house of grand mother of the Appellant.
12. Umesh Chandra (PW9) is the witness of seizure memo (Ex.P6, P7, P10 and P11). He has supported the case of the prosecution.
13. G.K. Sharma (PW10), Headmaster of Middle School, Sorit, District Raipur has stated that vide seizure memo (Ex.P12), Dakhil-Kharij Panji (Admission-Transfer Register) of the school was seized from him. He has further stated that as per the said register, the date of birth of the prosecutrix is 17.7.1981.
14. Dr. (Smt.) B. Kerketta (PW11) is the witness who examined the prosecutrix and gave report (Ex.P16). She has deposed that during medical examination of the prosecutrix, she did not find any external injury. She found that hymen was ruptured. She also found slight swelling in labia majora. She has deposed that no

definite opinion could be given regarding recent sexual intercourse with the prosecutrix.

15. Assistant Sub-Inspector Murli Manohar Yadu (PW12), who investigated the offence, has supported the case of the prosecution.
16. On minute examination of the evidence adduced by the prosecution, it reveals that as per the statement of the prosecutrix (PW5), she went along with the Appellant on her own will. From the evidence of the prosecutrix, it is further clear that she had ample opportunity to shout and tell the nearby people about the incident and come out of the clutches of the Appellant, but she did not do so. Therefore, she was the consenting party to the act done with her by the Appellant.
17. Now, the issue which needs to be decided is the date of birth and age of the prosecutrix.
18. According to the prosecutrix (PW5), on the date of incident, she was a student of 7th Standard. What is her date of birth has not been stated by her in her deposition. According to the statement of Bhagiram (PW6), father of the prosecutrix, the age of the prosecutrix, on the date of occurrence, was 15 years and 6 months. According to the copy of the relevant page of the Admission-Transfer Register (Ex.P13C) of the school and Ex.P14, the letter dated 24.4.1997 written by the Headmaster of Middle School, Sorit, District Raipur to the Station House Officer, Police Station Chhura, the date of birth of the prosecutrix is 17.7.1981. G.K. Sharma (PW10), Headmaster of Middle School, Sorit has stated that entry of date of birth of the prosecutrix was made in the

said register on the basis of the Transfer Certificate produced at the time of admission of the prosecutrix in the school. In paragraph 7 of the cross-examination, Bhagiram (PW6), father of the prosecutrix has stated that the actual date of birth of the prosecutrix is 6.1.1982. A perusal of the entries of the Kotwari Birth Register (Ex.D2) reveals that the date of birth of the prosecutrix is 19.1.1981. The intimation of this date of birth of the prosecutrix was given by her father Bhagiram (PW6). Thus, the Kotwari Birth Register (Ex.D2) appears to be more reliable than the Dakhil-Kharaj Register (Ex.P13C) of the school. As per the prosecution story, the date of incident is 31.3.1997. Therefore, on the date of incident, the age of the prosecutrix was about 16 years and 2½ months. Since she was a consenting party and her age on the date of incident was more than 16 years, no offence under Section 376 of the Indian Penal Code is made out against the Appellant. From the evidence on record, only the offence under Section 366 of the Indian Penal Code is made out.

- 19.** Therefore, the conviction and sentence imposed upon the Appellant under Section 376 of the Indian Penal Code is set aside. His conviction under Section 366 of the Indian Penal Code is affirmed.
- 20.** So far as sentence is concerned, it was submitted by Learned Counsel appearing for the Appellant that the Appellant has already undergone about 1 year and 3 months. He is facing the *lis* since 1997. He has no criminal antecedent. It was further submitted that the prosecutrix and the Appellant have performed marriage with each other and out of their wedlock they have also been blessed with two children and the Appellant and the prosecutrix are residing

together with their children. A supportive certificate dated 17.12.2016, stating that marriage has taken place between the Appellant and the prosecutrix and out of their wedlock they have also been blessed with two children, has also been submitted.

- 21.** Having regard to the facts and circumstances of the case, particularly, the fact that the Appellant and the prosecutrix have performed marriage with each other and out of their wedlock they have two children and they are residing together along with their children and further that the Appellant has already undergone about 1 year and 3 months, I am of the considered opinion that the interest of justice would be served if the Appellant is sentenced with the period already undergone by him and the fine imposed upon him is affirmed. Ordered accordingly.
- 22.** Consequently, the appeal is allowed in part to the extent indicated above.
- 23.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-
(Arvind Singh Chandel)
Judge