

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.816 of 2000

Judgment Reserved on : 29.8.2017

Judgment Delivered on : 21.9.2017

Ramadhar, aged about 19 years, S/o Shri Jagram Gond, R/o Village Dewarmal, Police Station Sakti, Tahsil Sakti, District Janjgir-Champa (MP) (now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh) through Police Station Sakti, District Janjgir-Champa (MP) (now Chhattisgarh)

--- Respondent

For Appellant	:	Shri Vishnu Koshta, Advocate
For Respondent/State	:	Shri Rajendra Tripathi, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment of conviction and order of sentence dated 8.3.2000 passed in Sessions Trial No.307 of 1999 by the Additional Sessions Judge, Sakti convicting the accused/Appellant under Section 376 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 7 years and to pay fine of Rs.10,000/- with default stipulation.
2. Case of the prosecution, in brief, is that on 10.2.1999, First Information Report (Ex.P1) was lodged by the prosecutrix (PW1) aged about 16 years alleging that before a year back when she was alone at her house, the accused came to her and demanded water. When she fetched water for him, he told her that he will marry her. Then he committed sexual intercourse with her.

Thereafter also, he committed sexual intercourse with her many times. When she conceived, she brought this fact to his knowledge and asked him to marry her, but he denied her to marry. Then she told her parents about the incident. A village panchayat was also called in this regard. The accused denied the allegations. Thereafter, the prosecutrix (PW1) lodged the First Information Report (Ex.P1). After investigation, a charge-sheet was filed against the accused under Section 376 of the Indian Penal Code. Charge under Section 376 of the Indian Penal Code was framed against him.

3. So as to hold the accused guilty, the prosecution examined as many as 19 witnesses. Statement of the accused under Section 313 Cr.P.C. was also recorded in which he denied the charge levelled against him, pleaded his innocence and false implication in the case.
4. After hearing the parties and appreciation of the evidence available on record, the Trial Court convicted and sentenced the accused/Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that the prosecutrix lodged the report against the Appellant after a year of the alleged incident. She has specifically stated in her oral evidence that she never disclosed the incident to anyone before her conceiving, which clearly shows that she was a consenting party. Therefore, no case is made out against the Appellant. Hence, the conviction and sentence imposed upon the Appellant is illegal. It was further submitted that the medical evidence including

the X-ray report available on the record clearly shows that on the date of incident, the prosecutrix was aged about 17-20 years, but the Trial Court held the Appellant guilty which is illegal.

6. On the other hand, Learned Counsel appearing for the State submitted that the impugned judgment is in accordance with law and there is no infirmity in the same.
7. I have heard Learned Counsel appearing for the parties and perused the material available on record including the impugned judgment minutely.
8. The prosecutrix (PW1) has deposed that 1 year prior to the date of her examination in the Court when she was alone at her house, the accused/Appellant came there and tempted to her that he would marry her and committed sexual intercourse with her. She further deposed that after 8 days, he again committed sexual intercourse with her at her small cottage (*Byara*) saying that he would marry her. Thereafter, her periods (menstrual-cycle) stopped. She, after long interval, informed about it to the Appellant in response to which he assured that he would marry her. When he did not marry her, she informed about it to her father Nanki (PW2). She further deposed that her father called a village panchayat in which the Appellant did not appear. Rather, his brother appeared in the panchayat, but he did not agree with the village panchayat. Then she lodged the First Information Report (Ex.P1) in Police Station Sakti.
9. The above statement of the prosecutrix (PW1) is duly corroborated by her father Nanki (PW2). He deposed that when his daughter

(the prosecutrix) was carrying pregnancy of 6 months, she informed her mother about the incident. Then his wife informed him about the incident. Thereafter, he called a panchayat meeting. Chhatram (PW3), Bhuvneshwar Prasad (PW8), Battulal (PW9), Manohar (PW10) and Santram (PW11), who were the witnesses of that panchayat meeting, have categorically stated that Nanki (PW2) had called a meeting in the village in which he had informed that the Appellant had committed sexual intercourse with her daughter (the prosecutrix) by alluring her and, therefore, she was carrying pregnancy. The above statement of the prosecution witnesses has not been rebutted by the Appellant.

10. It was argued by Learned Counsel appearing for the Appellant that the prosecutrix has specifically stated in her oral statement that she never disclosed the incident to anyone before conceiving, which clearly shows that she was a consenting party. It was further argued that the medical evidence including the ossification test report available on the record clearly shows that on the date of incident the prosecutrix was aged about 17 to 20 years. Therefore, no case is made out against the Appellant.
11. It is an admitted position that the FIR (Ex.P1) was lodged by the prosecutrix after 1 year from the incident. At that time, she was carrying a pregnancy of 6 months. She was examined by Dr. (Smt.) S.D. Singh Kanwar (PW7), who deposed that the secondary sexual characters of the prosecutrix were fully grown and she was carrying 22-24 weeks' pregnancy. Two fingers were easily inserting in her vagina. She opined that the prosecutrix was habitual to sexual intercourse.

12. In paragraph 6 of her cross-examination, the prosecutrix (PW1) has stated that on the date of incident, her parents were not at home and her brother had gone for studies and she was alone at her house. At that time, the Appellant came to her and demanded water. Thereafter, he forcibly committed sexual intercourse with her. But, she did not inform about it to anybody. She further admitted that later on whenever the Appellant performed sexual intercourse with her, she gave her consent as he always promised to marry her. In paragraph 9 of her cross-examination, she further deposed that whenever the Appellant called her in the small cottage (*Byara*), she went there. She also deposed that when she was carrying 6 months' pregnancy, she informed about the incident to her parents for the first time. In paragraph 12 of her cross-examination, she further deposed that she told the Appellant several times that she would inform her parents about the incident, on this, on all the occasions, the Appellant beat her, but she did not complain about the incident to anyone after any such occasions.
13. From the conduct of the prosecutrix, it is apparent that she was a consenting party to the act of the Appellant. She had enough opportunity to disclose the incident to her parents or report the matter to the police. Even after coming to know about her pregnancy, she did not lodge a report in the police promptly, but waited for the decision to be taken by the panchayat and when no decision was taken by the panchayat in her favour, she thought of lodging of the FIR. Therefore, from the above conduct of the prosecutrix, it is clear that she was a consenting party.
14. So far as the age of the prosecutrix is concerned, there is no

documentary evidence produced except the ossification test report (Ex.P16). As per Ex.P16, the age of the prosecutrix has been determined as 16-17 years on the date of examination. Dr. R. Jitpure (PW19), in his cross-examination, has categorically stated that the age of the prosecutrix could not be less than 16 years because head of radius was fused and Iliac Crest had appeared.

- 15.** It is well settled that the ossification test is only an indicator and not a conclusive proof of age of a person. In the ossification test, a variation of 2 years is possible on either side.
- 16.** In the light of above discussion, it is now necessary to examine the other evidence available on record regarding age of the prosecutrix. It was earlier mentioned that there is no documentary evidence available on record regarding age of the prosecutrix. As per the prosecution case, the incident took place before a year from lodging of the FIR (Ex.P1) on 10.2.1999 on which date the age of the prosecutrix is mentioned as 16 years. Meaning thereby, at the time of incident, she was about 15 years of age. The prosecutrix (PW1) was examined on 20.11.1999. On that date, in her deposition-sheet, her apparent age was mentioned as 15 years. But, the prosecution failed to question the prosecutrix on her age. Not a single question or any suggestion was put to her by the prosecution regarding her age. Therefore, no fact could be gathered from her regarding the issue of age. Nanki (PW2), father of the prosecutrix (PW1) was examined in the Court. Similarly, no question or any suggestion was put to him also regarding the issue of age. The prosecution has not placed on record the birth entry or any other authentic proof of age of the prosecutrix. Therefore, the

prosecution has withheld material piece of evidence regarding age of the prosecutrix from the Court due to which adverse inference can also be drawn against the prosecution.

17. In **State of Madhya Pradesh v. Munna alias Shambhoo Nath**, 2015 AIR SCW 6029, the Supreme Court has observed thus:

“9. From the X-ray report of the ossification test, the doctor opined that the age of the prosecutrix could not be more than 14 years. However, since the doctor was never examined, the X-ray report is not sufficient to prove the age of the prosecutrix. The prosecutrix was examined as PW5 but the prosecution failed to question the prosecutrix on her age, therefore no fact could be gathered from her regarding the issue of age. PW6 Malti Devi mother of the prosecutrix was examined where she sated the age of prosecutrix to be 13 years. However, in her cross-examination, she stated that her marriage was performed about 20 years ago and after two years of her marriage the elder daughter (Sunita) was born, and 2-3 years thereafter the prosecutrix was born. It means that the prosecutrix was aged about 15-16 years at the time of the incident. But this is not sufficient to come to any conclusion about the exact age of the prosecutrix. It appears that the Ossification Test, X-ray report is not sufficient to prove the age of the girl. Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent.”

18. If this Court examines the evidence available on record regarding the age of prosecutrix, it is clear that as per the ossification test

report, the age of the prosecutrix was about 16-17 years. Therefore, some other cogent supporting evidence regarding the age of the prosecutrix is essential, but no other documentary evidence is collected by the prosecution in this regard. During the recording of statements of the prosecutrix and his father, no question was put to them regarding age of the prosecutrix or her date of birth. Therefore, the prosecution has totally failed to prove that the age of the prosecutrix was below 16 years on the relevant date. Since the prosecutrix was a consenting party and the prosecution has failed to establish that she was below 16 years of age on the date of occurrence, the offence under Section 376 of the Indian Penal Code is not proved beyond doubt against the accused/Appellant.

19. In the premises of aforestated, the judgment under challenge, being exceptionable, is set aside and the appeal is allowed. The Appellant is acquitted of the charge framed against him.
20. It is reported that the Appellant is on bail. His bail bonds shall continue for a further period of six months from today in terms of Section 437A of the Code of Criminal Procedure.
21. 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