

**HIGH COURT OF CHHATTISGARH, BILASPUR**

(91)

**CRA No. 2936 of 1998**

Gajanand son of Langada Satnami, aged 21 years, resident of  
Kharve, PS Kasdol, District Raipur, MP. (now C.G.)

**--- Appellant****Versus**

The State of Madhya Pradesh (now C.G.)

**---Respondent**

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For appellant - Shri Deepak Jain, Advocate.  
For Respondent/State - Shri Suryakant Mishra, PL

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**Hon'ble Shri Justice Goutam Bhaduri****Order****30/08/2017**

1. The appeal is against the judgement of conviction and sentence dated 2/12/1998 passed by the First Additional Sessions Judge, Baloda-Bazar, District Raipur in Sessions Trial No.108/96. By such order appellant has been convicted under sections 363, 366 and 376 (1) of IPC. Under section 363 IPC no sentence has been awarded to the appellant, under Section 366 of IPC appellant has been sentenced to 7 years RI and to pay fine of Rs.1000/-, in default of payment of fine, further RI for 1 year has been awarded and under Section 376 (1) of IPC appellant has been sentenced to 7 years RI and to pay fine of Rs.5000/-, in default of payment of fine, further RI for 1 year has been awarded.

2. As per the prosecution case, it is alleged that the appellant/accused has enticed away the minor girl victim PW-9 who was of 13 years old on the pretext of marriage and took away from the lawful guardianship of her parents and committed sexual intercourse. When a missing report was lodged by parents of the victim, thereafter

victim was recovered from the possession of the appellant/accused from village Bhaisapasra by Ex.P-3. Thereafter, after recovery of the girl, she was subjected to medical check up and on medical check up it was found that she was subjected to sexual intercourse. Thereafter, after due investigation charge sheet was filed. During the course of trial, the appellant abjured the guilt and claimed to be tried. Prosecution on their behalf had examined as many as 14 witnesses and after evaluating the evidence, the trial court convicted and sentenced the accused as aforesaid. Hence this appeal.

3. Learned counsel for the appellant submits that conviction made by the trial court cannot be sustained. He submits that the victim was a major and was consenting party, she herself had went alongwith the appellant and did not object to the incident, therefore the consent can be assumed from the conduct. It is further submitted that doctor in this case has also not been able to prove that victim was subjected to rape and only on presumption the conviction has been made. He further submits that no evidence is on record that the victim was taken from the lawful custody of her parents so as to commit offence under Section 363 and 366 of IPC. Consequently, the entire order is bad in law and same requires to be set aside.

4. Per contra, learned State counsel supports the judgement and conviction and would submit that conviction made in this case is well merited which do not require any interference.

5. I have perused the record of the court below including the evidence adduced. Initially the facts would show that a missing report was lodged in the rojnamcha sanha which is marked as Ex.P-10. The report was lodged by one Manoharlal Sahu that on 20/10/95 the

girl/victim was missing. Subsequently, the victim was recovered on 28/10/95 at village Bhaisapasra, Baloda Bazar by Ex.P-3. Thereafter, statement of the victim was recorded. The victim was examined as PW-9. She stated that she went alongwith the appellant and stayed at village named Chirpot for 8 days in the house of one Kallu wherein she was subjected to sexual intercourse. Thereafter, she went to village Bhaisapasra and stayed for 3 days at Bhaisapasra with the accused/appellant. During such stay they used to sleep in the same cot. Subsequently, police came and recovered them. In the cross examination further she stated that earlier also while going to house of her maternal uncle, at that time also she went alongwith the accused in his cycle. Therefore the prior acquaintance can be assumed that of girl and appellant. Amrika Bai mother of the victim was examined as PW-8. This witness in respect of this incident has deposed that on asking her daughter has said she had went alongwith the appellant to Baloda and except that nothing was disclosed by her. The maternal grand father Latel PW-4 stated that victim after she was missing she was found after 15 to 20 days and it was disclosed by the victim that she eloped with the appellant to celebrate some festival. Witness further stated that Gajanand the appellant/accused used to perform dance in group wherein the victim also used to travel with them. In such group they used to go out for different period of time and come back after performance of the show.

6. Victim has deposed that they stayed in the house of one Kallu when she went alongwith the accused. Kallu was examined as PW-2. He stated that alongwith the appellant/accused one girl came to their house and they stayed. Statement of the witness do not show that



victim at that time resisted any act and would show that she herself went alongwith the appellant. So statement of the mother, victim and person named Kallu in whose house the victim and the accused stayed would show that PW-9 prosecutrix went alongwith him and did not resist at any point of time, she got many opportunities to complain or to run away but she made no effort. Statement would show that she made no protest while travelling from one place to other for 10-15 days and no complaint was also made to the relatives after seeing them.

7. With respect to the age Dr. Kamal Kumar Gajbiye was examined as PW-14. He has proved X-ray report Ex.P-12. Doctor deposed that the X- ray was not conducted by him but he identified the signature of the doctor who had done it and named him Dr. Naveen Khanna. Ex.P-12 would show that age of the victim is shown to be in between 14-15 years.

8. In Modi's Jurisprudence (20<sup>th</sup> Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be up to 3 years on either side.

9. Further margin of error in age has been judicially recognised by the Supreme Court in case of **Jaya Mala v. Govt. of J & K** reported in **(1982) 2 SCC 538**. In the aforesaid judgment, it is observed as follows:

"9...However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

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10. Said proposition has been further reiterated in a case between **Alamelu & Anr. Vs. State represented by Inspector of Police** reported in **(2011) 2 SCC 385**.

11. In this case it would show that the doctor who proved the age PW-14 is not primary evidence. He has only proved the document Ex.P-12 was issued by Dr. Khanna. Since primary evidence was not examined, therefore it would appear that there was no occasion for the accused/appellant to cross-examine the doctor who conducted the radiological test. Therefore, prosecution though relied on such document giving margin, benefit of doubt in respect of the age leans in favour of the appellant and it cannot be conclusively held that prosecutrix was a minor. Dr. PW-3 Rama Tiwari who examined the victim had given report by Ex.P-2 and opined that intercourse have been done. With respect to ascertain the age doctor advised for X-ray. As appears prosecution has failed to prove the fact with certainty that at the time of the incident girl was a minor. Ex.P-10(B) by which slide was prepared of the victim was sent for FSL and the FSL report Ex.P-11 shows that only saree and underwear was sent and the under wear and saree also do not confirm the fact that it contains spermatozoa as it was opined that blood group of the stains on the items could not be determined for the reason that it was disintegrated.

12. Taking into totality of the facts, it would show that prosecution has failed to prove the fact that at the time of the incident victim was a minor. The way the incident happened that victim eloped with the appellant to different village stayed there in the house of one Kallu for 6-7 days, she could have ran away or made any complaint shows that she was a consenting party. Subsequently, she again travelled to

different village wherein she stayed alongwith the appellant and she was eventually recovered by the police on the missing report. In view of that, I am of the opinion that the prosecution has failed to prove that the prosecutrix was a minor on the date of incident. Consequently, conduct and circumstances would point out that she was a consenting party to the entire incident with the appellant. In view of the above facts and circumstances of the case, offence under sections 363, 366 and 376 IPC would not be made out against the appellant.

13. In the result, appeal is allowed and the conviction & sentence imposed on the appellant is set aside. He is acquitted of the charges framed against him. Appellant is on bail. His bail bond shall continue for a period of 6 months in view of provision contained under Section 437-A of Cr.P.C.

**Sd/-**  
**Goutam Bhaduri**  
**Judge**