

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 2414 of 1999

1. Man Singh Gond son of Dhaneshram alias Baya Mehra aged about 24 years, R/o Hathband, Police Station Newra, District Raipur, CG

---- Appellant

Versus

1. State of Madhya Pradesh (Now Chhattisgarh) through Police Station Bhatapara, District Raipur.

---- Respondent

For Appellant	-	Shri Anil Singh Rajput, Advocate.
For Respondent	-	Smt. Madhunisha Singh, PL

Hon'ble Shri Justice Pritinker Diwaker

Judgment on Board

24/11/2017

This appeal is directed against the judgment and order dated 31.08.1999 passed by Additional Sessions Judge Baloda Bazar, District Raipur in Sessions Trial No. 296/1990 convicting the accused/appellant under Sections 363, 366 and 376 IPC and sentencing him to undergo rigorous imprisonment for three years with fine of Rs. 500/- u/s 363; rigorous imprisonment for five years with fine of Rs. 500/- u/s 366 and rigorous imprisonment for seven years with fine of Rs. 1000/- u/s 376 IPC, plus default stipulations.

2. Case of the prosecution in brief is that on 17.07.1990 the accused/appellant eloped the prosecutrix (PW-3) and ultimately she was recovered from Dongargarh in the company of accused/appellant on 28.07.1990. During this period they visited

various places such as Bilaspur, Howra, Bhilai, Durg, Rajnandgaon etc. On 28.07.1990 FIR Ex. P-16 was lodged by father of the prosecutrix namely Ganesh Prasad Tiwari alleging that the accused/appellant allured away his daughter (prosecutrix). Based on this report, offence under Sections 363 and 366 IPC was registered against the accused/appellant. She was medically examined by Dr. (Smt.) Vrinda Mandge (PW-16) who gave her report Ex. P-16-A. Prosecutrix was also examined radiologically by Dr. S.C. Vishnoi (PW-16) vide x-ray report Ex. P-17. Accused/appellant also underwent medical examination by Dr. P. Mukundan (PW-8) vide report Ex. P-7. After completion of investigation, charge sheet was filed by the police for the offence punishable under Sections 363, 366 and 376 IPC followed by framing of charges accordingly.

3. So as to hold the accused/appellant guilty, prosecution has examined 18 witnesses in support of its case. Statement of the accused/appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the charges levelled against him and pleaded his innocence and false implication in the case.

4. After hearing the parties, the trial Court has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment.

5. Counsel for the accused/appellant submits as under:

(i) That there is inordinate delay in lodging the FIR.

(ii) That conduct of the prosecutrix in visiting several places, staying in hotel and some house and then submitting herself to the accused for sexual intercourse without offering any protest or making complaint to anyone for a period of 10 days demonstrates that she was a consenting party to the act of the accused/appellant.

(iii) That there is no conclusive evidence as to the prosecutrix being minor on the date of incident.

(iv) That though as per the x-ray report the radiologist has assessed the age of the prosecutrix as 15-16 years at the relevant time but at the same time keeping in mind the genealogy, nourishment and climatic factors he has also given her probable age in between 18 and 19 years.

(v) That the transfer certificate Ex. P-5 mentioning the date of birth of the prosecutrix as 12.12.1975 cannot be a basis to determine her age as the author of the same has not been examined by the prosecution.

(vi) That the medical report Ex. P-16 also does not support the case of the prosecution.

6. On the other hand, counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellants under Sections 363, 366 and 376 IPC are strictly in accordance with law and there is no infirmity in the same.

7. Heard counsel for the parties and perused the evidence on record.

8. Prosecutrix (PW-3) has stated in the Court statement that the accused/appellant conveying his love towards her took her to Bilaspur and they both stayed there in a hotel. At Bilaspur, the accused/appellant is stated to have committed forcible sexual intercourse with her and then taken her to Dongargarh where the police apprehended them. According to this witness, the accused/appellant had threatened her of life in case she refused to accompany him. According to her, she did not know her date of birth but the year of birth has been stated as 1976. In cross-examination she is stated to have visited Bilaspur, Howra, Bhilai, Durg, Rajnandgaon; stayed in a hotel at Bilaspur and in the house of acquaintance of the accused at Howra; enjoyed movie and went to the studio for photography with the accused. Dr. (Smt.) Vrinda Mandge (PW-16) is the witness who medically examined the prosecutrix and gave her report Ex. P-16 stating that she did not notice any mark of struggle on her body; two fingers easily entered her vagina, hymen was old torn, no injury was found on private part. She has further stated that no definite opinion could be given regarding commission of rape on the prosecutrix. Dr. S.C. Vishnoi who is also marked as PW-16 is the witness who radiologically examined the prosecutrix has stated that the age of the prosecutrix at the relevant time was 15-16 years. In cross-examination he however has opined her age in between 18 and 19 years looking to the nourishment, genealogy and climatic factors. Prem Shankar Bajpai (PW-7) is the witness who has proved the transfer certificate Ex. P-5 in which the date of birth of the prosecutrix has been mentioned as 12.12.1975 and that way her

age at the relevant time comes to 14 year and 07 months. This witness however stated that the said certificate has been issued on the basis of the school register which has not been produced in the Court. According to him, he never made any entry in the said register. Dr. P. Mukandan (PW-8) is the witness who medically examined the accused/appellant and gave his report Ex. P-7 stating that he was capable of having sexual intercourse. D.K. Sinha (PW-18) is the investigating officer who has duly supported the case of the prosecution.

9. Before adverting to the question of consent on the part of the prosecutrix, this Court deems it appropriate to first decide her age on the date of incident - whether minor or otherwise. Prosecutrix has not been able to disclose her exact date of birth. She has just given the year of birth as 1976 but that too without anything in support. None of her dearest ones including mother, sister and uncle could disclose her correct age at the relevant time. Though the transfer certificate Ex. P-5 mentioning the date of birth of the prosecutrix as 12.12.1975 has been filed by the prosecution but none of the witnesses could establish as to on what basis such entry was made. School teacher (PW-7) from whom the register was seized has stated that the certificate (Ex.P-5) was issued by him on the basis of entries made in the register by some other teacher posted then in the school. Further, the radiologist (PW-16) has stated that age of the prosecutrix at the relevant time was 15-16 years but at the same time he has given an opinion that her age could also be in between 18 and 19 years looking to the nourishment, genealogy and climatic factors. The teacher making

entry in the school register has however not been examined by the prosecution. Thus from the material gathered by the prosecution it could not be established conclusively that on the date of incident the prosecutrix was minor particularly when the radiologist has given her probable age as 18-19 years also at the relevant time.

10. Now the second and last question to be decided is whether the abduction of and sexual intercourse with the prosecutrix was per force or consensual? Evidence reveals that on 17.07.1990 the prosecutrix left the Poha Mill in the company of the accused/appellant and visited several places such as Bilaspur, Howra, Bhilai, Durg, Rajnandgaon etc. and she was recovered from Dongargarh on 28.07.1990 i.e. after about 10 days. Evidence further discloses that during this period they stayed in a hotel at Bilaspur and in a house at Howra and enjoyed sexual intercourse many a time. Had all that been really against the wishes and without the consent of the prosecutrix, she could have narrated her tale to the people coming across during this long period but no attempt in this regard appears to have been made and a false picture of her being taken away and subjected to forcible sexual intercourse by the accused/appellant was painted only after the police recovered her from Dongargarh in the company of the accused. Furthermore, medical evidence also does not support the case of the prosecution as the doctor examining the prosecutrix has clearly stated in her evidence that there was no external or internal injury on her body, two fingers easily entered her vagina and the hymen was old torn.

11. In view of the aforesaid discussion, the findings recorded by the Court below convicting the accused/appellant under Sections 363, 366 and 376 IPC are not based on due appreciation of the evidence on record and therefore liable to be struck down. Appeal is therefore allowed, judgment impugned is hereby set aside and the accused/appellant is acquitted of the charges levelled against him. Being already on bail, he needs no order to be set free etc. and the bonds so furnished stand discharged.

Sd/-

(Pritinker Diwaker)

Judge

