

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 547 of 2002**

- Shivkumar S/o Shivbaran Giri, aged about 27 years, village Bangacha Haldibadi, P.S. Chirimiri District Koriya (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through P.S. Sonhat District Koriya (C.G.)

---- Respondent

For Appellant.	-	Shri R.S. Marhas, Advocate.
For Respondent	-	Shri Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker &
Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment On Board**Per Pritinker Diwaker, J****27/03/2017**

This appeal arises out of the judgment of conviction and order of sentence dated 30.04.2001 passed by the First Additional Sessions Judge, Baikunthpur (Koriya) in Sessions Trial No.55/01 convicting the accused/appellant under Sections 376, 363, 366 of IPC & sentencing him to undergo R.I. for ten years, R.I. for three years and R.I. for three years respectively. All the sentences are directed to run consequently.

02. As per the prosecution case, on 18.06.1999, the prosecutrix, after leaving her house from Kewrabahara, accompanied the accused/appellant and visited several places. Missing report Ex.P/10 was lodged on 23.06.1999 by father of the prosecutrix Shambhudas (PW/8). The prosecutrix lived with the accused/appellant for about a year and during this period she also delivered a male child. On

27.07.2000, the statement of the prosecutrix under Section 161 of Cr.P.C. was recorded, based on which, F.I.R. (Ex.P/9) was registered against the accused/appellant under Sections 363, 366 and 376 of IPC. In her statement recorded under Section 161 Cr.P.C. and in FIR (Ex.P/9), it has been alleged by the prosecutrix that on 18.06.1999 she was allured by the accused/appellant for marriage and lived with him for quite sometime. During this period she became pregnant and delivered a male child, who subsequently expired. It has been further alleged that she was minor and the accused/appellant took her along with him against her wishes. The prosecutrix was medically examined vide Ex.P/3 on 31.07.2000 by Dr. (Mrs.) Kalawati Patel from where she was referred to radiologist for determination of her age; her ossification test was conducted on 16.12.2000 vide Ex.P/5 by Dr. Ashish Karan (PW/5) and according to his report, the radiological age of the prosecutrix was above 20 years. The accused/appellant was also medically examined vide Ex.P/6 and was found to be capable of performing sexual intercourse.

03. After investigation, charge sheet was filed against the accused/appellant under Sections 363, 366, 376 IPC and accordingly charges were framed against him by the trial Court.

04. So as to hold the accused/appellant guilty, the prosecution examined as many as 09 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and

sentenced the accused/appellant as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellant submits as under:

- that there is inordinate delay of about one year in lodging the F.I.R. The prosecutrix accompanied the accused/appellant of her own without offering any protest or resistance and she continuously remained with the accused/appellant for about one year;
- that the prosecutrix had also delivered a male child and till then no report was lodged. Apparently, present is a case of consent but unfortunately the accused/appellant has been falsely implicated in the crime in question;
- that as per the ossification test, radiological age of the prosecutrix was above 20 years and the trial Court has erred in law in determining the age of the prosecutrix to be below 18 years. It has been argued that the Court is not expert in determining the age of the prosecutrix and the Court is obliged to follow the radiological age of the prosecutrix;
- that there is no other legally admissible evidence showing the prosecutrix to be below 18 years of age.
- that the accused/appellant has already remained in jail for more than five years; the incident occurred about 18 years back and no useful purpose would be served in sending him back to jail.

07. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the accused/appellant is strictly in accordance law and there is no infirmity in the same.

08. We have heard learned counsel for the parties and perused the

material available on record.

09. Prosecutrix (PW/6) has stated that she was born in the year 1985. One year prior to the incident, the accused/appellant along with her cousin Devchandra and one girl which was eloped by him (Devchandra) had come to her house and stayed for 10-15 days. About 15 days later, the accused/appellant again came to her house and took her to Radhenagar where they stayed for one night. Thereafter, the accused/appellant and his companion took her to village Kudariya where they stayed for 3-4 days. She has also stated that from village Kudariya both of them went to Sorga, from Sorga they ultimately went to Bicchikala where they stayed in one of her relatives' house for about 3-4 months. She states that at Bicchikala the accused/appellant had physical relation with her which continued for quite some time and during this period she became pregnant. After three months, she came to accused/appellant's house at Chirmiri and stayed there till April from where she wrote a letter to her mother stating that she is going to deliver a child and called her for delivery. This witness has further stated that for the first time she did not accompany her mother, however, when her mother again came to take her (this witness), she had gone with her (mother) and delivered a male child who subsequently expired. From the cross-examination of the prosecutrix, it is apparent that during her stay period with the accused/appellant all alone she was free and had physical relation with the accused/appellant without offering any resistance or protest there-against.

10. Dr. (Mrs.) Kalawati Patel (PW/4) conducted the medical examination of the prosecutrix vide Ex.P/3. According to her, the prosecutrix was a lactating mother and habitual to sexual intercourse.

Dr. Ashish Karan (PW/5) conducted ossification test of the prosecutrix vide Ex.P/5. According to him, the prosecutrix was above 20 years of age. It is relevant to note that no question was put to this witness as to how the age of the prosecutrix was determined by him.

11. Maanmati (PW/7) is mother of the prosecutrix. She has stated that the accused/appellant had come to her house along with her nephew Devchandra about two years back. Prior to date of incident, they stayed in her house for 10-12 days and thereafter they went back. According to this witness, the prosecutrix eloped along with the accused/appellant, she (prosecutrix) was extensively searched and then she (this witness) states that it is the accused/appellant who had taken the prosecutrix along with him. This witness has further stated that the prosecutrix became pregnant and thereafter she was called by her. According to this witness, the prosecutrix is her eldest child and that she (this witness) was aged about 15 years at the relevant time.

12. Shambhudas (PW/8) is father of the prosecutrix. According to this witness, the date of birth of prosecutrix is 25.10.1987 and that she was 16 years of age. In cross-examination, this witness has stated that he does not remember the exact date of birth of other child. While diving little dipper in to the evidence of this witness, it comes to forefront that he is not sure about the date of birth of the prosecutrix.

13. Janakram Kurre (PW/9) is investigating officer who has duly supported the prosecution case. He has also seized the mark sheet (Ex.P/11) of the prosecutrix vide seizure memo Ex.P/8, however, the author of the said mark sheet was not examined.

14. We have heard counsel for the parties and taken note of the material collected by the prosecution including the evidence of the

witnesses much less the prosecutrix, to the hilt. Evidence of the prosecutrix makes it crystal clear that she accompanied the accused/appellant on 18.06.1999 and visited several places and stayed together for 3-4 months in the house of her relative and during all this long period they enjoyed physical relationship without any protest from her side. Surprisingly, during her visit to number of places and stay for months together the prosecutrix must have had the sufficient opportunity to make a disclosure of her being taken away and subjected to sexual intercourse by the accused/appellant but all throughout she chose to keep quiet and ultimately when she delivered a male child and appellant did not take her with him, the report has been lodged. Further, the conduct of the prosecutrix in not resisting the act of the accused and submitting herself to his disposal speaks in volumes regarding her clear cut consent. It is, thus, held that the prosecutrix was a consenting party.

15. The next question which arises for consideration by this Court is whether the finding recorded by the trial Court that the prosecutrix was minor on the date of incident is correct or not.

16. The ossification test report (Ex.P/5) shows the prosecutrix to be above 20 years of age at the relevant time i.e. the date on which such test was conducted. However, the trial Court setting at naught such ossification report has straight away arrived at a conclusion on the basis of scanty presence of the armpit hair and pubic hair that she at the relevant time was below 16 years of age and thus minor for all practical purposes. The trial Court has fallen in error while arriving at such erroneous conclusion to take note of the fact that presence of pubic hair and armpit hair may differ in person to person on the basis of the biological distinctive features and the environment in which one is born

and brought up. There cannot be a blanket formula to determine the age merely on the basis of such secondary sexual characteristic because the Courts are not supposed to have the requisite expertise in determination of such factors as they are the matters to be mastered beyond the judicial realm. This proposition has been already settled by the Apex Court in number of cases. In this case, though the school register discloses the date of birth of the prosecutrix as 25.10.1987 but in the absence of any material to show as to on what basis such entry was made, it is rendered wholly meaningless. It was the bounden duty of the prosecution to prove this fact by examining the author who has entered such date of birth but all this has not been done. Even the parents of the prosecutrix did not spell out as to what was the exact date of birth of the prosecutrix. Moreover, the witness conducting the ossification test has described eloquently the requisite radiological parameters on the basis of which the age determination is carried out and in this case also he has held her to be above the age of 20 years only then. Even if the observation of the Court below that such determination may have two year variation on the either side, is taken into consideration, even then on the date of incident the prosecutrix cannot be held to be below 18 years of age. Thus, from the material collected by the prosecution, whether medical or otherwise, the prosecutrix does not appear to have been minor on the date of incident.

15. The findings recorded by the Court below thus appear to be beyond proper appreciation of the evidence adduced by the prosecution which cannot have affirmation from this Court. Since, the prosecution has failed on all fronts to prove its case, the benefit, of course, has to go to the accused. The appeal is thus allowed, judgment impugned is

hereby set aside and the accused/appellant stands acquitted of the charges levelled against him. As the appellant is reported to be on bail, his bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(R.C.S. Samant)
JUDGE