

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 438 of 2011

- Vinod Kumar, S/o Bandhu Ram Kashyap, aged about 20 years, R/o Mahamayapara, Ambikapur, Chhattisgarh.

---- Appellant

Versus

- State Of Chhattisgarh through Police Ambikapur, District Surguja, Chhattisgarh.

---- Respondent

For Appellant	:	Smt. Savita Tiwari, Advocate.
For Respondent/State	:	Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Judgment On Board

21/06/2017

This appeal arises out of the judgment of conviction and order of sentence dated 29.4.2011 passed by the II Additional Sessions Judge, Ambikapur, Distt. Surguja in S.T.No.125/10 convicting the accused/appellant under Sections 363, 366 and 376(1) of IPC and sentencing him to undergo RI for 5 years, pay a fine of Rs.500/-; RI for 5 years, pay a fine of Rs.500/-; and RI for 10 years and pay a fine of Rs.1000/- with default stipulations respectively.

02. As per the prosecution case, on 21.1.2010 a written report Ex.P/6 was lodged by PW-3 Preetram alleging in it that his daughter/prosecutrix (PW-1), aged 14 years, who was studying in Class 8th has eloped on 8.1.2010 with the appellant who was residing

in his house for the last one month. In this report it has also been mentioned that information has been received by this witness that the prosecutrix and the appellant have performed marriage and she is living in the house of the appellant. When this witness had gone to the house of the appellant, the prosecutrix refused to accompany him. Based on this written report, FIR (Ex.P/7) was registered against the appellant under Sections 363 and 366 of IPC on 21.1.2010. On 21.1.2010 the prosecutrix was recovered from the house of the appellant vide recovery panchnama Ex.P/4. On 21.1.2010 itself the prosecutrix was medically examined vide Ex.P/15 and the doctor found that her secondary sexual characters were fully developed, her hymen was old torn and she appeared to be habitual to sexual intercourse. However, no definite opinion regarding recent sexual intercourse could be given. During the course of investigation, two marksheets (Ex.P/9C and P/10C) of the prosecutrix of Class 6th were produced by PW-3 Preetram, father of the prosecutrix, wherein her date of birth is mentioned as 12.2.1996. After filing of charge sheet, the trial Court framed charges under Sections 363, 366 and 376(1) of IPC against the appellant.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 9 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.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned

judgment convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment.

05. Learned counsel for the appellant submits as under:

- that there is no legally admissible evidence showing that the prosecutrix was minor at the time of incident. The author of the marksheets (Ex.P/9C and P/10C) has not been examined.
- Though PW-3, father of the prosecutrix, has stated that he had noted the date of birth of the prosecutrix on a separate piece of paper, but that piece of paper has not been produced and it appears that merely on the basis of assumption, her date of birth has been recorded as 12.2.1996.
- that even as per medical report, secondary sexual characters of the prosecutrix were fully developed and she was found to be habitual to sexual intercourse.
- That no ossification test of the prosecutrix was conducted by the prosecution to ascertain her age.
- That the prosecutrix was a consenting party, she remained with the appellant for about 13 days, visited several places without any protest and during this period they also performed marriage.
- That the appellant is in jail since 21.1.2010, thereby has already completed about 7 years of jail sentence and therefore, he may be set free forthwith.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of the appellant is strictly in accordance with law and there is no illegality or infirmity in the judgment impugned warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 prosecutrix has stated that the accused/appellant allured her and took her along with him in a truck to a nearby jungle and they stayed in a house. She has stated that from there they had gone to the house of aunt of the appellant, however, the appellant did not do anything with her and then they went to the house of the appellant where he did not do anything. Her father came to take her back, but she refused to accompany. At this stage, she has been declared hostile. In her cross-examination by the A.G.P., she has stated that the appellant was residing in her house since November, 2009, she had good relations with him, he used to work in her house and that they had physical relations. She has further stated that she was allured by the appellant that he would marry her and then he took her along with him. She has stated that initially she was taken to two places and thereafter she and the appellant had gone to the house of the appellant where they had physical relation. She has stated that the appellant also performed marriage with her in the temple. In cross-examination by the defence, she has stated that whatever the accused/appellant used to earn, he would give the said earning to her father. When her father came to take her back, she refused to go with him and at that time she did not disclose to him that they have performed marriage. She has stated that with her consent the accused/appellant established physical relations with her and she asked him to live as husband and wife as they have performed marriage.

09. PW-2 Devanti Devi, mother of the appellant, has stated that the prosecutrix eloped with the appellant and after coming to know that she is with the appellant, she and her husband had gone to take her back, but she refused to come back and thereafter, the police brought her back. She has stated that the appellant and the prosecutrix wanted to marry for which she and her family members were not agreeing as the prosecutrix was minor. However, she has admitted the suggestion that in their society marriage of the girl is performed at the age of 14-15 years. PW-3 Preetram, father of the prosecutrix, has stated that age of her daughter/prosecutrix was 14 years, she had eloped with the appellant and after coming to know of her whereabouts he went there and brought her back. He states that on being enquired the prosecutrix informed her that the appellant has committed rape with her. He has proved making of written report Ex.P/6 and lodging of FIR (Ex.P/7). He states that the police had asked for marksheets of the prosecutrix, which were given by him and marked as Ex.P/9C and P/10C. He admits that the appellant was his relative and their relations were good. He has further admitted the fact that his daughter/prosecutrix never made any complaint against the appellant. He has also admitted the fact that he has already deserted the real mother of the prosecutrix and PW-2 is her step-mother. He states that date of birth of the prosecutrix was noted by him on a separate piece of paper which was mentioned in the school certificate, however, the said document has not been seized by the police nor he has brought the same in the Court.

10. PW-4 Rispal Ram, grand-father in relation of the prosecutrix has stated that date of birth of the prosecutrix is 12.10.1996 and that in the

night intervening 7/8.1.2010 he was informed by his daughter-in-law (PW-2) that the prosecutrix and the appellant are not there in the house and subsequently he came to know that she has eloped with the appellant and living with the appellant at his house. The prosecutrix was recovered from the house of the appellant after 12-13 days. PW-5 Mahendra Kumar, Home Guard, is a witness of seizure of underwear of the appellant vide Ex.P/13. PW-6 Dr. JP Sahu medically examined the prosecutrix on 21.1.2010 and found that her secondary sexual characters were fully developed, her hymen was old torn and she appeared to be habitual to sexual intercourse. However, no definite opinion regarding recent sexual intercourse could be given. PW-8 Shivaram has turned hostile. PW-9 RK Nishad, investigating officer, has supported the prosecution case.

11. In the instant case, the appellant has been convicted under Section 376(1) of IPC holding the prosecutrix minor. However, from the record, it appears that there is no conclusive proof or legally admissible evidence in relation to her age which could suggest that on the date of incident she was minor. Though oral statements have been made by the prosecutrix, her mother and father that she was minor at the relevant point of time and as per her marksheets (Ex.P/9C and P/10C) her date of birth is shown as 12.2.1996, but the prosecution has failed to prove as to on what basis the said date of birth has been recorded. PW-3, father of the prosecutrix, has stated that said date of birth was noted by him on a separate piece of paper, but the said document has not been produced by the prosecution. Even ossification test of the prosecutrix has not been done to determine her age.

It is a settled legal position that the date of birth mentioned in the school register or any such document has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Merely proof of such documents would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. In these circumstances, the date of birth as mentioned in the documents Ex.P/9C and P/10C in the present case has no probative value and the same cannot be accepted. Rather the medical evidence shows that secondary sexual characters of the prosecutrix were fully developed and she was found to be habitual to sexual intercourse. Thus, considering the overall evidence available on record, this Court is of the view that the prosecution has utterly failed to prove that on the date of incident the prosecutrix was a minor.

12. Now the next question for consideration is whether the sexual intercourse between the appellant and the prosecutrix was consensual or against her wishes and without her consent?

13. Close scrutiny of the evidence makes it clear that the accused/appellant was residing in the house of the prosecutrix, they were having good relations and on 8.1.2010 she eloped with the appellant, visited two places and thereafter stayed in his house for about 8-9 days and during this period, they performed marriage and had physical relations. She has admitted the fact that this physical relation was with her free consent as they had performed marriage. Initially, the prosecutrix was declared hostile by the prosecution, however, on being further examined she admitted the fact that she had

physical relation with the appellant. Considering the overall statement of the prosecutrix, it is quite apparent that sexual intercourse between the appellant and the prosecutrix was not per force or against her will or without her consent, rather it appears to be a peaceful affair with the consent of the prosecutrix. This being the position, the appellant can, by no stretch of imagination, be held guilty of the offence under Section 376(1) of IPC, as has been held by the trial Court, and he deserves to be acquitted of the said charge by extending him benefit of doubt.

14. In the result, the appeal is allowed. The impugned judgment is set aside and the appellant is acquitted of the charges under Sections 363, 366 and 376(1) of IPC by giving him benefit of doubt. He is reported to be in jail, therefore, he be set free forthwith if not required in any other case.

Sd/

(Pritinker Diwaker)
Judge