

**AFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No.1310 of 2015**

Judgment reserved on : 1.3.2017

Judgment delivered on : 4.5.2017

Sunil Kumar Jangdey, Aged about 26 Years, S/o Anjori Jangdey,  
R/o Village Bharuwadih, P.S. Palari, Civil and Revenue District  
Balodabazar Bhatapara (Chhattisgarh)

**---- Appellant**

**versus**

State of Chhattisgarh through Police Station Palari, Civil and  
Revenue District Balodabazar Bhatapara (Chhattisgarh)

**---- Respondent**

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For Appellant : Mr. Rakesh Thakur, Advocate

For Respondent/State : Mr. Sanjeev Pandey, Govt. Advocate  
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**Hon'ble Shri Justice Anil Kumar Shukla**

**C.A.V. Judgment**

**1.** Challenge in this appeal is to the judgment of conviction and sentence dated 17.05.2013 passed by the First Additional Sessions Judge, Balodabazar in Sessions Trial No.56/2012, whereby the learned Additional Sessions Judge has convicted and sentenced the Appellant as under:

| Sl. No. | Conviction            | Sentence                                                                                                                                                                                                |
|---------|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1       | Under Section 323 IPC | Rigorous Imprisonment for 3 months and fine of Rs. 200/-, in default of payment of fine, to further undergo rigorous imprisonment for 1 month                                                           |
| 2       | Under Section 363 IPC | Rigorous Imprisonment for 3 years and fine of Rs. 200/-, in default of payment of fine, to further undergo rigorous imprisonment for 1 month                                                            |
| 3       | Under Section 366 IPC | Rigorous Imprisonment for 4 years and fine of Rs. 300/-, in default of payment of fine, to further undergo rigorous imprisonment for 2 months                                                           |
| 4       | Under Section 376 IPC | Rigorous Imprisonment for 7 years and fine of Rs. 500/-, in default of payment of fine, to further undergo rigorous imprisonment for 3 months<br><br>All the sentences are directed to run concurrently |

**2.** Case of the prosecution, in brief, is that prosecutrix (PW-1), before lodging First Information Report (Ex.P-2), had made a written complaint dated 30.10.2012 (Ex.P-1) in Police Station Palari that one year prior to 30.10.2012 she was studying in Xth Standard in the school situated in her village Risda. The Appellant, who was a resident of Village Bharuwadih, used to visit her Village Risda. The prosecutrix and the Appellant were, therefore, acquainted with each other. One year prior to lodging

of the written complaint (Ex.P-1), i.e., in the month of June, the prosecutrix went to Village Bharuwadih. The Appellant met with the prosecutrix there. He told her that he loved her and he will keep her as his wife and saying this he took her to his house and committed forcible sexual intercourse with her there without her consent. He continued to commit forcible sexual intercourse with her for about 1 year. When the prosecutrix wanted to return her maternal house, he threatened her of life. He used to quarrel with her. The prosecutrix gave birth to a child (son) as a result of the sexual intercourse committed with her by the Appellant. The age of the son, on the date of making the written complaint (Ex.P-1), was 1 month. As per the written complaint, the Appellant again committed *marpeet* with the prosecutrix on 29.10.2012. Therefore, the prosecutrix anyhow fled from the house of the Appellant and went to her father's house at Village Risda. Thereafter, she along with her father and other village residents went to Police Station Palari and lodged the written complaint (Ex.P-1). On the basis of her written complaint, Crime No.348 of 2012 was registered against the Appellant under Sections 363, 366, 376, 506, 323 IPC. After obtaining consent (Ex.P-3) from the prosecutrix, her medical examination was conducted and the reports of which are Ex.P-13 and Ex.P-16. Spot maps (Ex.P-4 and Ex.P-5) were prepared. On submitting by the prosecutrix, a photocopy of her mark-sheet of middle school examination (Ex.P-12C) was seized vide Ex.P-7. Underwear of the Appellant was seized vide Ex.P-8. The Appellant was arrested

vide Ex.P-9. He was medically examined by Dr. F.R. Nirala (PW-5) and report of the medical examination is Ex.P-10. Vaginal slides of the prosecutrix were prepared and sent to the Forensic Science Laboratory for chemical examination and the report of the FSL is Ex.C1.

**3.** After completion of the investigation, a charge sheet was filed against the Appellant in the Court of Judicial Magistrate First Class, Balodabazar, in turn, the Judicial Magistrate First Class committed the case to the Court of Session at Raipur from where the First Additional Sessions Judge, Balodabazar received the case on transfer.

**4.** The First Additional Sessions Judge framed charges against the Appellant under Sections 363, 366, 376, 323 and 506 Part II IPC. The Appellant denied the guilt and claimed trial. Statements of witnesses were recorded. In his statement under Section 313 CrPC, the Appellant defended himself that he is innocent and has been falsely implicated in the case and he has performed marriage with the prosecutrix in his society.

**5.** After appreciation of the evidence available on record, the First Additional Sessions Judge acquitted the Appellant of the charge under Section 506 Part II IPC, but convicted him under Sections 323, 363, 366, 376 IPC and sentenced him thereunder as mentioned in the first paragraph of this judgment. Hence, this appeal.

**6.** Learned Counsel appearing for the Appellant argued that the conviction and sentence imposed upon the Appellant is contrary to the facts and law. The prosecutrix has not stated anything about any injury sustained by her. She has only stated that the Appellant committed *marpeet* with her. The prosecutrix had accompanied and gone with the Appellant with her own consent. The prosecution has not been able to prove that the age of the prosecutrix on the date of incident was below 16 years. The finding arrived at by the Trial Court in this regard is not correct. The prosecutrix resided with the Appellant as his wife voluntarily. The written complaint was lodged by the prosecutrix against the Appellant only after a dispute arose between them after *Chhatti* ceremony of their son. The impugned judgment of conviction and sentence is not sustainable in the eyes of law. Therefore, the conviction and sentence imposed upon the Appellant may be set aside and the Appellant may be acquitted of the charges framed against him.

**7.** Learned Counsel appearing for the State submitted that the impugned judgment of conviction and sentence is impeccable and does not warrant any interference by this Court.

**8.** To bring home the offence, the prosecution examined the prosecutrix (PW-1), Rajkumar (PW-2), Panchram (PW-3), Bhupendra (PW-4), Dr. F.R. Nirala (PW-5), Santosh (PW-6),

Rukhmani (PW-7), Narendra Borse (PW-8), Dr. Anita Verma (PW-9) and Paurush Purre (PW-10). The Appellant has not examined any witness in his defence.

9. The prosecutrix (PW-1) has deposed that her age on the date of her deposition in the Court, i.e., 11.2.2013 was 16½ years. One year prior to the incident, she was studying in Xth Standard in the school situated in her Village Risda. The Appellant, who was a resident of Village Bharuwadih, used to visit the house of his relative in Village Risda, therefore, she was acquainted with him. One year prior to lodging of the written complaint (Ex.P-1), she had gone to Village Bharuwadih. The Appellant met with her there. He told her that he loved her and he will keep her as his wife and saying this he had committed forcible sexual intercourse with her there without her consent. The Appellant had kept her at his house. If she wanted to go out of the house of the Appellant, he threatened her of life. She has given birth to a child (son) because of the forcible sexual intercourse committed by the Appellant with her. She further deposed that after one week of the *Chhatti* ceremony of their son, the Appellant committed *marpeet* with her, then she fled from the house of the Appellant and came to her maternal house at Village Risda and narrated the incident to her parents. This witness has admitted the lodging of written complaint (Ex.P-1). Which part of the body of the prosecutrix was injured in the *marpeet* committed by the Appellant is not mentioned by her in

her written complaint (Ex.P-1) nor is it stated in her Court statement. The written complaint (Ex.P-1) also does not contain the date of birth of the prosecutrix. The prosecutrix has stated that she had given a photo copy of her school mark-sheet to the police, which was seized by the police vide Ex.P-7. The witness has stated her date of birth to be 14.5.1996, but she has not stated the correct date of incident in her written complaint (Ex.P-1) nor has mentioned it in her statement too. The written complaint (Ex.P-1) only discloses that the incident took place one year prior to its lodging. What were the actual circumstances at the time of incident is not clear from the evidence of the prosecutrix. According to the prosecutrix, the incident took place one year prior to her lodging of the written complaint (Ex.P-1) and at the time of incident her age was 15½ years.

**10.** The father of the prosecutrix Santosh (PW-6) has stated the age of the prosecutrix to be 16½ years. He has not deposed the date of birth of her daughter (the prosecutrix) before the Court. In cross-examination, he has stated that he had recorded the date of birth of the prosecutrix in his diary. This diary has not been seized by the police nor has it been produced before the Court by the witness at the time of his deposition.

**11.** Rukhmani (PW-7), the mother of the prosecutrix, had produced the original school mark-sheet of the prosecutrix before the Court whose photo copy is placed on record as Ex.P-

12C. Rukhmani (PW-7) also does not remember the date of birth of her daughter (the prosecutrix). This witness has admitted that at the time of admission of the prosecutrix in the school her age was 7 years. According to the prosecutrix, at the time of incident, she was studying in Xth Standard. In these circumstances, the age of the prosecutrix, at the time of incident, would be 17 years.

**12.** The prosecution has not produced the relevant school admission register before the Court nor has examined the Principal of the concerned school in respect of age of the prosecutrix. No Kotwar Register or Panchayat Register has been seized by the police nor has any relevant witness been examined in the Court with regard to age of the prosecutrix.

**13.** Dr. Anita Verma (PW-9) has deposed in para 6 of her deposition that X-ray of joint of right wrist was done for ascertaining the age of the prosecutrix. It was found in the X-ray report that joint of the right wrist of the prosecutrix was not fully joined. Dr. Anita Verma (PW-9), in her report (Ex.P-13), has opined the age of the prosecutrix to be 16 to 18 years with a margin of error of two years on either side. For determination of age of the prosecutrix, no other examination has been performed except the X-ray examination. In this regard, Learned Counsel appearing for the Appellant has placed reliance on para 10 of the

judgment in **Kanhaiya v. State of C.G., 2006 (1) CGLJ 453**, which reads as under:

“10. The only point which requires consideration now is the age of the prosecutrix on the date of occurrence. Dr. Smt. S. Sawant P.W. 14 has stated that on examination of the prosecutrix, she found that all 32 teeth had erupted and the prosecutrix was a fully developed lady. Learned counsel for the appellant has placed reliance on page 49 of the *Medical Jurisprudence and Toxicology by Modi 22<sup>nd</sup> edition* to argue that the third molars or wisdom teeth erupt in the 17<sup>th</sup> to 25<sup>th</sup> years of age. This shows that the prosecutrix was at least 17 years of age on the date of occurrence. The observation of Modi is of definit significance in this case. The Ossification test conducted by Dr. A.K. Sahu P.W. 8 also shows that the estimated age of the prosecutrix was opined to be about 15 years. It is settled law that a legally permissible margin of error of 2 years on either side has to be given in the estimation of age given in the report of Ossification test.”

**14.** As far as the date of birth mentioned in the school mark-sheet of the prosecutrix produced in the Trial Court is concerned, this date of birth has no importance because the Principal of the concerned school or the concerned clerk who made the entry of the date of birth of the prosecutrix in the school admission register has not been examined in the Court. For proving the date of birth of the prosecutrix, no Kotwar Register or Panchayat Register has been produced in the Court by the prosecution nor

has any relevant person been examined in the Court in this regard. Santosh (PW-6) and Rukhmani (PW-7), who are father and mother of the prosecutrix, have also deposed that they do not remember the date of birth of their daughter (the prosecutrix). Therefore, if date of birth of a child is got registered in the school admission register on the basis of mere assumption, that may serve the purpose of admission of the child in the school, but that cannot be admissible in evidence and arriving at a finding by a Court on the basis of such date of birth would not be safe. In this regard, Learned Counsel appearing for the Appellant has placed reliance on paragraphs 42 to 49 of the judgment in **Alamelu and another v. State Represented by Inspector of Police, (2011) 2 SCC 385**, which read as under:

“42. Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi v. Anand Purohit*, 1988 Supp SCC 604 observed as follows: (SCC pp. 618-19, para 14)

“14. .... *The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.* .... Merely because the documents Exts. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to

proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. *The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue.* No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. *In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.”* (emphasis supplied)

**43.** The same proposition of law is reiterated by this Court in *Narbada Devi Gupta v. Birendra Kumar Jaiswal*, (2003) 8 SCC 745, where this Court observed as follows: (SCC p. 751, para 16)

“16. .... The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who

can vouchsafe for the truth of the facts in issue'."

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW 8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the court, PW 8, the x-ray expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed *approximately*. He had also stated that it is likely that the age *may vary from individual to individual*. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to

19 years. This margin of error in age has been judicially recognised by this Court in *Jaya Mala v. Govt. of J&K*, (1982) 2 SCC 538. In the aforesaid judgment, it is observed as follows: (SCC p. 541, para 9)

“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.”

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.

48. We may further notice that even with reference to Section 35 of the Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in *Ravinder Singh Gorkhi v. State of U.P.*, (2006) 5 SCC 584 which held as follows: (SCC p. 595, para 38)

“38. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election;

registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. *A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.* (emphasis supplied)

**49.** In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor.”

**15.** Therefore, from the evidence of the prosecution, the actual age of the prosecutrix on the date of incident is not proved and it is also not proved that on the date of incident she was below 16 or 18 years of age.

**16.** From the evidence of the prosecutrix (PW-1) it is evident that the prosecutrix remained stayed with the Appellant at his house for about one year till she gave birth to a child (their son). According to the statement made by the prosecutrix (PW-1) in cross-examination at para 11, she was residing with the Appellant in his Village Bharuwadih and during her reside there she was also going to take bath in a pond situated in that village. Other village ladies were also taking bath in that pond. For attending the call of nature also, the prosecutrix was going in the village out of the house of the Appellant. Her friendship had also been developed with many girls of Village Bharuwadih. Despite these favouring circumstances, she never tried to come out of the clutches of the Appellant and continued to reside with the Appellant at his house at Village Bharuwadih till she gave birth to a child. In cross-examination, at para 12, she has further deposed that she along with the Appellant had visited her mother at Raipur where she was admitted in a hospital due to falling ill. On this occasion also, she did not make any effort to come out of the clutches of the Appellant. She has also admitted in her evidence that she along with the Appellant had gone to her maternal house at Village Risda from Village Bharuwadih.

She has also admitted that the Appellant, after her giving birth to their son, had taken her and their son to the house of his sister-in-law (*Bua*) at Village Risda and left there. Parents of the prosecutrix were also residing in Village Risda. On this occasion also, despite her staying at Village Risda, the prosecutrix did not go to the house of her parents at Village Risda and make them any complaint against the Appellant nor did she lodge any complaint against the Appellant in police station.

**17.** The prosecutrix (PW-1) has admitted in cross-examination that she was wearing *Mangalsutra* (necklace) and was filling in vermilion in the parting of her hair. She has further admitted in cross-examination at para 21 that on the date of her appearance for evidence in the Court also, i.e., 11.2.2013, she had worn *Mangalsutra* (necklace) and had filled in vermilion in the parting of her hair.

**18.** Thus, from the evidence of the prosecutrix (PW-1), it is evident that the prosecutrix remained stayed with the Appellant with her consent till she gave birth to a child (their son) and she lodged the written complaint (Ex.P-1) against the Appellant only after a *marpeet* took place between them after one week of the *Chhatti* ceremony arranged on the birth of their son. Therefore, in this circumstance, presumption of forcible sexual intercourse by the Appellant with the prosecutrix cannot be drawn nor can it be presumed that the Appellant kidnapped the prosecutrix for

the purpose of marrying her or for committing forcible sexual intercourse with her.

**19.** Therefore, from the above evidence of the prosecution, the offences under Sections 323, 363, 366 and 376 of the Indian Penal Code alleged against the Appellant are not proved.

**20.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charges framed against him.

**21.** It is reported that the Appellant is in jail. He is directed to be set at liberty forthwith, if not required in any other case.

Sd/-

**(Anil Kumar Shukla)**  
**Judge**