

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1081 of 2012

Sheikh Sharif, S/o. Sheikh Latif (Buddhu), aged about 28 years,
Caste - Musalman, R/o. Behind Haddi Godam, Amapara Dhamtari,
Police Station – Dhamtari, District – Dhamtari (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through : Station House Officer, P.S. -
Rajhara, District – Balod (C.G.)

---- Respondent

For Appellant : Mr. B.P. Singh, Advocate
For State/Respondent : Ms. M. Asha, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

05.05.2017

1. This appeal is against the judgment of conviction and sentence dated 09.10.2012, passed by the learned Additional Sessions Judge, Balod, District – Durg (C.G.), in Session Trial No.23/2012, whereby the appellant has been convicted under Section 363, 366 and 376(1) of I.P.C. and sentenced to undergo R.I. for 7, 7, 7 years and fine of Rs.50 -50 - 50/-, in default of payment of fine amount, additional R.I. for 3, 3 & 3 months respectively.
2. As per the case of the prosecution, a report was lodged by the complainant- Majeed Khan on 26.02.2012 alleging that his daughter who is aged about 15 years is missing from his house on which a missing report was lodged and eventually on 28.02.2012 after preliminary investigation, case was registered

against the appellant that the appellant enticed away the minor girl and has kidnapped and compelled her to marry. Subsequently on 05.03.2012, from the possession of the appellant, the girl was recovered from Mominpara Masjid. It was found that the appellant though knew the full fact that girl is minor has abducted the girl by enticing her away from the lawful custody of her parents and subsequently has committed rape.

3. During the investigation, medical examination of prosecutrix was made to confirm the allegations of rape and in respect of date of birth, the progress report of class-7th and other documents were seized. In respect of date of birth, from the school, Dakhil Kharij register was also seized and the garments and other slides were prepared in person from the prosecutrix and were sent for FSL. After recording the statement of the witnesses, the appellant was apprehended and charge-sheet was filed U/s. 363, 366 and 376 of I.P.C.
4. During the course of trial, the appellant/accused abjured his guilt and claimed to be tried. It was stated that the prosecutrix got married with the appellant and one Nikahnama was also executed, which would show that the appellant and the prosecutrix were married. However, subsequently, since there has been some difference of opinion the marriage was denied. It is stated that the prosecutrix herself had joined the company of the appellant after marriage, therefore, no offence is made out.

5. The prosecution on their behalf had examined the prosecutrix as (P.W.-1), Majeed Khan, the father of the prosecutrix as (P.W.-2), Safat Khan, the maternal uncle of the prosecutrix as (P.W.-3), Dr. Rashmi as (P.W.-4) who examined the prosecutrix, Dr. R. Ramteke as (P.W.-5), Head Master of the school Romeshwar Singh Thakur as (P.W.-6), Patwari Ishwar Singh Dewangan as (P.W.-7) and Investigating Officer Hemant Singh Thakur as (P.W.-8).
6. The appellant on his behalf had examined one Islahuddin as (D.W.-1), Buddhu @ Latif as (D.W.-2). The learned trial Court after examining the evidence on record, convicted the accused/appellant under the aforementioned sections, therefore, the instant appeal.
7. Mr. B.P. Singh, learned counsel for the appellant would submit that conviction in this case cannot be sustained as the prosecution itself has failed to prove that the prosecutrix was taken away from lawful custody of parents and was a minor. The counsel placed his reliance in case law reported in 2010 (1) CCSC 258 (SC) Sunil Vs. State of Haryana and would submit that though the age of the prosecutrix is said to have been proven by the Ex.P/20, but the author of the document has not been examined. It is further submitted that date of birth was recorded in the register has also not been proved. He further submits that on the date of incident, the prosecutrix had become major and the marriage had taken place as per Nikahnama and therefore, the case would not make out

against the appellant. He further submits that radiologist report also shows that on the date of incident, the prosecutrix became major; therefore, the conviction on the basis of statement of the prosecutrix is wrong and is completely against the evidence on record, which requires modification by setting aside the same.

8. *Per contra*, Ms. M. Asha, learned Panel Lawyer for the State opposes the argument advanced by learned counsel for the appellant and supported the order of the Court below and would submit that the order is well merited which do not call for any interference. She further submits that the age of the prosecutrix is proved to be of 15 years, six months & four days on the date of incident, therefore, ground of consent will be of no help to the appellant, therefore, the appeal may be dismissed.

9. I have heard learned counsel for the parties at length, perused the documents and statements on record.

10. Perused the evidence and the documents exhibited on record.

The prosecutrix in this case has been examined as (P.W.-1). She stated that on the date of incident, when she was going to school, she met the appellant on the road. It was stated that, it was stated by the appellant that his sister had called her at village Kusumkasa, therefore, had gone with the appellant. It is stated that, she was taken to other place at Balod and then to Dhamtari and thereafter she was given some food and she lost her conscious and she do not remember anything. It is stated

that thereafter in such condition, she was subjected to sexual intercourse. It is further stated that where ever she used to raise her voice by alarm, no one came for her help even the mother and father of the accused did not came for rescue.

11. In the cross-examination at para -9, the prosecutrix had stated that before the incident, the appellant had come to her house to solemnize marriage but it was denied by the parents of the prosecutrix on the ground that she was minor. Thereafter the appellant went back. Perusal of the statement would show that she admits that phone number of the appellant was known to her i.e. 98271-71398, which was procured through the sister of the appellant. The suggestion with respect to the marriage, the prosecutrix has denied that no Nikahnama was executed. When further suggestion was given to her, it was also denied that after the marriage, the prosecutrix and the appellant were staying at Mominpara, Raipur. The documents would show that she was recovered from Mominpara, Raipur on 05.03.2012. The same document is exhibited as Ex.P/1. Therefore, the fact that she was found at Mominpara, Raipur is not in dispute. So far as perusal of the statement of the victim that she was administered with intoxication, the omission exists in the statement recorded under Section 161 of Cr.P.C., which is marked as Ex.P/6. Further she was threatened also, is also missing, which was admitted by the prosecutrix in her cross-examination at para-17. The prosecutrix has further admitted that she does not know her date of birth.

12. With respect to the date of birth of the prosecutrix, the prosecution has examined Romeshwar Sing Rathore (P.W.-6), the Head Master of school. This witness has proved the Dakhil Kharij register Ex.P/19(C) and Ex.P/20, which is a birth certificate, wherein the prosecutrix's date of birth is shown as 19.08.1997. In the cross-examination, this witness has stated that he cannot confirm the fact whether such date of birth was entered in Dakhil Kharij register according to Kotwari Panji or birth certificate. This witness has also admitted that the document, Ex.P/20 was not a birth certificate. The prosecutrix (P.W.-1), in her statement had not stated about her date of birth anywhere, instead only stated that the mark-sheet was recovered from her of Class-7th, which was marked as Ex.P/5. The father of the prosecutrix, Majeed Khan (P.W.-2) had not stated the date of birth of the prosecutrix. Likewise, the maternal uncle (P.W.-3) has also not stated any date of birth of the prosecutrix though he has proved the document Ex.P/5, the mark-sheet of Class-7th of the prosecutrix.

13. The learned Court below has solely relied on the document of mark-sheet, the Dakhil Kharij register and the birth certificate, which are Ex.P/5, Ex.P/19 (C) and Ex.P/20. Now the question arises for consideration that whether such date of birth would have been accepted to sustain the conviction.

14. The Hon'ble Supreme Court in a case of ***Birad Mal Singhvi V. Anand Purohit***¹, had observed in para 24 as under :-

¹ AIR 1988 SC 1796

"24..... The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date or birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

15.The same was reiterated again in case of ***Sunil Vs. State of Haryana***², where in the Hon'ble Supreme Court has considered the submission and held that conviction cannot be based on approximate date, which is not supported by any record. Therefore, on consideration of the totality of the facts and circumstances, this Court comes to the opinion that on the date of incident, the prosecutrix was a minor has not been proved by prosecution beyond reasonable doubt and therefore, benefit of doubt with respect to age of the prosecutrix has to lean in favour of the accused.

16.The Supreme Court in case of ***Alamelu and Another Vs. State Represented by Inspector of Police***³ has reiterated the earlier principles laid down in case of ***Birad Mal Singhvi***

2 2010 (1) CCSC 258 (SC)

3. (2011) 2 SCC 385

(Supra) that 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.

17. The examination of the evidence available would further show that the prosecution has placed on record the radiological report, which is proved by the prosecution as Ex.P/3, wherein the age of the prosecutrix is shown to be 15-16 and half years. This was admitted by the prosecutrix (P.W.-1) and was proved by the prosecutrix during her examination. Therefore, the documents having been produced by prosecution and was exhibited, it will have persuasive evidentiary value and the Court can certainly look into it including the contents of it to presume a fact in issue. Reading of the contents of the document would show that according to the prosecution itself, they projected the age of the prosecutrix of 15 - 16 and half years, therefore, the radiological age having stated between 15 to 16 and half year, the margin of another 2 years would be available to the either side and if such margin of two years is further added then in such case, the age of the prosecutrix may be between 17 to 18 and half years. Therefore, in the case in hand to determine the age of the prosecutrix two sets of evidence are available before the Court i.e. one is the school register/dakhil kharij register and the second is radiological report. The radiological report contradicts the Dakhil Kharij register. The benefit of doubt leans in favour of appellant on the basis of radiological report as it can be

presumed to be 18 & half that of prosecutrix. So considering the age of the prosecutrix to be more than 16 and half years even according to Ex.P/3 and further taking into the date of incident, which was of the year 2012, the offence U/s. 376 would not be made out as before the amendment of Section in 2013, according to sixthly explanation in order to hold the commission of rape, the age of prosecutrix was fixed to 16 years. Taking into such fact and in view of the discussion aforesaid supra, the benefit of doubt is to be given to the appellant qua the age of prosecutrix and it can be presumed that she was more than 16 years on the date of incident. Accordingly the conviction made under Section 376 (1) of I.P.C. is set-aside.

18. Now coming to the other Sections 363 and 366 of I.P.C., the statement of the prosecutrix (P.W.-1) are examined in between the lines, major contradictions appears in the Court statement. It was stated that she was administered with intoxicated substance thereafter, she was not in know of any fact that what happened. Further taking into the other documents, which are on record, which would show that she was recovered at Mominpara, Raipur from the custody of the appellant after about 10 days of incident. The evidence is also on record, the prosecutrix remained in custody from date of disappearance from 22.02.2012 to 05.03.012 i.e. about two weeks. The statement would further show that she traveled from different

place in the company of appellant and these facts remained unexplained.

19.As it has been held earlier, the prosecutrix as appears to be more than 16 years, therefore, again the benefit of doubt leans in favour of the appellant and the offence U/s. 363 would hardly made out in view of the statement of prosecutrix and the evidence which are on record. In absence of statement of the prosecutrix that the appellant kidnapped her with intention to marry against her will and was forced to illicit intercourse, conviction U/s. 366 cannot be sustained. The prosecutrix had sufficient opportunity not only to run away from the custody but she was in the company of the appellant for quite reasonable time for about two weeks and in absence of plausible explanation, the conviction U/s. 363 & 366 of I.P.C. can not be sustained.

20.In view of the aforesaid analysis and conclusion, the judgment of conviction and order of sentence passed by the learned trial Court is set aside. The appeal is accordingly allowed. The appellant is acquitted of the charges leveled against him by the trial Court. The appellant is reported to be in jail, he be set at liberty forthwith, if not required in any other case.

Sd/-
(Goutam Bhaduri)
JUDGE