

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1096 of 2012

Sanjay Kumar Nayak S/o Krisht Das Nayak, aged about 26 years, R/o Village Santoshpur, District Koraput (Orissa), at present Jagdalpur, P.S. Jagdalpur, District Bastar, C.G.

---- Appellant

Versus

State of Chhattisgarh through the SHO, P.S. Frejarpur, District Bastar C.G.

---- Respondent

For Appellant	:	Shri Arun Kocher, Advocate.
For Respondent-State	:	Shri Vinod Tekam, Panel Lawyer

Hon'ble Shri Justice P. Sam Koshy

Judgement on Board

13/02/2017

The present appeal has been preferred against the judgment of conviction dated 26.09.2012 passed by the Sessions Judge, Bastar place Jagdalpur in Sessions Trial No. 170 of 2011 whereby the appellant has been convicted for the offence punishable under Sections 363, 366 & 376 of IPC and sentenced to undergo rigorous imprisonment for three years with fine of Rs.500/- for each of the offence u/s 363 & 366 of IPC and rigorous imprisonment for seven years with fine of Rs.1,000/- u/s 376 of IPC with default stipulations.

2. Counsel for the appellant submits that the impugned order of conviction is bad in law for the reason that the prosecution in the instant case has not been able to establish the fact that the prosecutrix at the time of incident was a minor. According to him, the prosecution has failed to provide any cogent evidence by which it could be determined that the prosecutrix PW-1 was a minor. He submits that so far as reliance placed

on the Dakhil Kharij Register to establish the date of birth is concerned, the prosecution has failed to establish the date of birth by leading evidence of the person who had made entry in the Dakhil Kharij Register or at least lead evidence of the person on whose information the entry was made in the said Register. So far as the date of birth mentioned in the mark sheet and the other Transfer Certificate is concerned, PW-2 Vimla Nag, the teacher of the school has stated that the same was made on the basis of the entry found in the Dakhil Kharij Register. Therefore, the version of PW-2 would not be acceptable. Counsel for the appellant submits that in the absence of any proof establishing the age of the prosecutrix, it has to be presumed that she for all practical purposes at the time of incident was a major. So far as the conduct of the prosecutrix being a consensual party is concerned, counsel for the appellant submits that the prosecutrix had left her home voluntarily on 08.10.2011 and the FIR was lodged on 14.11.2011 i.e. after more than one month. In between, the appellant and the prosecutrix are said to have travelled to different places and there was ample opportunities for the prosecutrix to raise an alarm and even protested from having any sort of relationship with the present appellant. That not reacting and protesting or raising any alarm or seeking for relief by itself gives a clear indication of she being a consenting party. It is also the contention of the counsel for the appellant that the prosecutrix had not even intimated anybody at the place where she was residing with the appellant in respect of she being forcefully kept by the appellant which also leads to draw an inference of the prosecutrix being a consenting party. Thus, counsel for the appellant prays for setting aside of the impugned order and seeks for the acquittal of the appellant.

3. State counsel however, opposes the petition on the ground that the statement of the prosecutrix is paramount which has to be considered and in the instant case she has categorically levelled allegation against the appellant of having forcefully committed sexual intercourse with her. State counsel submits that the prosecutrix has stated that she was subjected to threat of dire consequences if she informed anybody and that the appellant was always carrying a knife in his pocket. Thus, on the statement of the prosecutrix alone the offence alleged against the appellant is made out and therefore the appeal does not warrant any interference. State counsel also referred to the statement of PW-2 who is a teacher and has proved the Dakhil Kharij Register and the mark sheet of the prosecutrix for proving the age of the prosecutrix. Likewise, the prosecutrix was also subjected to radiological examination wherein also the prosecutrix was found to be over 13 years but below 16 years of age. Therefore, the minority of the prosecutrix stands established both from the documents as well as from the medical evidence.

4. Having heard the rival contentions put forth by the counsel appearing on either side and on perusal of the record what is undisputed is the fact that the prosecutrix had voluntarily left her house along with the present appellant in an Auto. It is not in dispute that the appellant took the prosecutrix to Kumbharpara first where both stayed for a night in her sister's house where the appellant is said to have committed sexual intercourse with the prosecutrix. It is also not in dispute that next day morning, without any hesitation and protest, the prosecutrix again accompanied the appellant to Jaipur (Orissa) by bus and enroute she must have met with a number of people including police officials yet she did not show any sign of protest nor did she seek any help from any

person. It is also not in dispute that at Jaipur they had stayed together for a period of more than one month during which they had on many occasions had physical relations. It is also revealed that during this one month period, the prosecutrix did not raise any protest at any point of time nor did she raise any alarm seeking for help from any person. The whereabouts of the prosecutrix could be traced only when she rang up from a telephone booth informing her parents that she was staying along with the appellant and they had got married. Thereafter, the parents of the prosecutrix reached Jaipur and recovered the prosecutrix.

5. So far as the age of the prosecutrix is concerned, the radiologist only suggests that her age was between 13 to 16 years. As far as the Dakhil Kharij Register and the mark sheet are concerned, the same have not been proved as is required in view of the decision of the Supreme Court in the case of **Alamelu and another Vs. State, represented by Inspector of Police**, reported in **AIR 2011 SC 715** wherein it has been categorically held that the entries made in the Dakhil Kharij Register should be proved by the person who had made entry in the Register or at least should be proved by the person on whose information the entry was made. But the aforesaid burden of proof has not been discharged by the prosecution. In the instant case, the father of the prosecutrix PW-4 is not aware of the date of birth of the prosecutrix as is evident from paragraph-5 of his evidence which reads as under:

“मेरी लड़की नियानार मे पैदा हुई थी तब मैंने उसके जन्म के संबंध में कोटवारी रजिस्टर में या थाना में कोई सूचना दर्ज नहीं करवाया। मेरी लड़की को स्कूल में भर्ती कराने में स्वयं नहीं गया था। मेरी पत्नी और मेरे पिताजी गये थे। उन्होंने लड़की की जन्म तिथि में क्या और किस आधार पर लिखाया मैं नहीं जानता हूँ। यह कहना सही है कि, मेरी लड़की का शपथ पत्र प्रडी-1 में मेरी लड़की प्रमिला का ही फोटो चस्पा है और उसी के हस्ताक्षर है। यह कहना सही है कि, इसमें मेरी मेरी बेटी की जन्म तिथि 13.08.91 है।”

PW-2 is the person who has proved Dakhil Kharij Register and mark sheet but from her statement itself it is evident that she is not the person who had made entry in the school Register and that she had issued a Transfer Certificate to the prosecutrix on the basis of the entry made in Dakhil Kharij Register. Therefore, on the basis of the PW-2 it cannot be said that the age of the prosecutrix has been proved as is required under the law.

6. It would be relevant at this juncture to refer to the decision of Supreme Court in case of **Birad Mal Singhavi Vs. Anand Purohit**, reported in **AIR 1988 SC 1796**, wherein the Supreme Court dealing with the issue of method by which entries made in the public record could have been proved, referring to Section 35 of the Indian Evidence Act. In paragraph 15 it has been held as under :

“15.....Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoying by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoying by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.....”

Relying upon the aforesaid principles of law laid down, the Supreme Court again in case of *Alamelu and another Vs. State*, represented by Inspector of Police, reported in AIR 2011 SC 715, while

dealing with the facts similar to the present case, in paragraph 38 & 40 has held as under :

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex. P/16 and the certificate issued by PW-8 Dr. Gunasekaran, Radiologist, Ex. P/4 and Ex. P/5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.....

40. 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 can not be relied upon to definitely fix the age of the girl.”

It is also trite at this juncture to refer to decision of Supreme Court in case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, reported in 2003 (8) SCC 745, wherein the Supreme Court had observed as under:

"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".

7. The Division Bench of this High Court in case of *State of Chhattisgarh Vs. Dipak Kumar & Another*, reported in 2013 (1) CGLJ 353 (DB), relying upon the ratio of law laid down by the Supreme Court in case of *Alamelu (Supra)* had taken a similar view. Likewise, again in

case of Suresh Nishad Vs. State of Chhattisgarh, reported in 2013 (2) CGLJ 435, the co-ordinate Bench of this High Court had re-iterated the principles of law laid down by the Supreme Court in case of Alamelu (Supra).

8. So far as the report of the Radiologist suggesting the age of the prosecutrix at the time of incident to be between 13 to 16 is concerned, it would be relevant at this juncture to refer to the decision of the Supreme Court in the case of **Jaya Mala v. Home Secretary, Government of Jammu & Kashmir & Others, AIR 1982 SC 1297** wherein the Supreme Court in paragraph-9 has held that the margin of error in age ascertained by radiological examination is two years on either side.

In **State of M.P. v. Narendra Kumar Haridas Deshlahare, 2002 (2) M.P.L.J. 399**, the Madhya Pradesh High Court, relying on the aforesaid decision of the Supreme Court in **Jaya Mala** (supra), held as follows :

“8. In view of the above pronouncement and law laid by the Supreme Court the finding on age reached by the learned trial Judge that the prosecutrix was between 14 to 16 years is merely an approximation and two years margin on either side could be given. The prosecution, therefore, has failed to conclusively prove that the prosecutrix was below 16 years of age.

9. If she was above 16 years of age, had carried on love affair with the accused, eloped with her for marriage and had sexual intercourse with him for number of days, the reasonable inference is that she consented to cohabit with the accused. The accused was unmarried young boy aged 24 years and his act of sexual intercourse with the prosecutrix with her consent cannot be held to be an offence under Section 376 of the Indian Penal Code.”

In **K.P. Thimmappa Gowda v. State of Karnataka, AIR 2011 SC 2564**, the Supreme Court in paragraphs 12 & 13 held as follows :

“12. In criminal cases, the rule is that the accused is entitled to the benefit of doubt. If the court is of the opinion that on the evidence two views are reasonably possible, one that the

appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

13. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape.”

9. Thus, the age which has been suggested by the Radiologist i.e. in between 13 to 16 years, if the margin as stated by the Supreme Court and the High Court in the aforesaid decisions is given, would be enhanced by two years and the prosecutrix would reach to the age of 18 years making her a major at the time of the incident.

10. In view of the aforesaid legal pronouncements which have been made by the Supreme Court and the High Court and on perusal of the evidence which has come on record, this Court has no hesitation in reaching to the conclusion that the prosecution in fact has not been able to establish that the prosecutrix at the time of incident to be a minor. In the absence of any strong cogent evidence establishing the prosecutrix to be a minor at the time of incident, it has to be presumed for all practical purposes of her being a major and the benefit of which shall go in favour of the appellant. Further, from the evidence which has come on record and from the conduct of the prosecutrix it clearly reflects that she was a consenting party and that there was a consensual relationship between the prosecutrix and the appellant.

11. In the given factual matrix of the case and in the light of the judicial pronouncement referred to herein above, the impugned judgment of

conviction and sentence cannot be sustained and the same deserves to be and is accordingly set aside.

12. Consequently, the appeal is allowed. The judgment of conviction and sentence dated 26.09.2012 is set aside and the appellant is acquitted of the offence under Sections 363, 366 & 376 of IPC. The appellant is reported to be in jail. He be released forthwith if not required in any other case.

**Sd/-
(P. Sam Koshy)
JUDGE**