

HIGH COURT OF CHHATTISGARH, BILASPUR
Hon'ble Shri Justice Rajendra Chandra Singh Samant

CRA No.1040 of 2014

Raja Babu

Versus

State Of Chhattisgarh

CAV JUDGMENT

Post for 09/01/2017

JUDGE

06/01/2017

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1040 of 2014****Judgment Reserved on 22/11/2016****Judgment Delivered on 09 /01/2017**

- Raja Babu S/o Shri Ramkripal Rathore Aged About 23 Years
R/o Village Desaee, P.S. Shah Nagar, Distt. Panna (M.P.) at
Present Rooplaxmi, Siltara, P.S.-Dharsinva, Civil and Rev.
Distt. Raipur(C.G.)

----Appellant**Versus**

- State Of Chhattisgarh Through SHO, P.S.-Dharsinva, Distt.
Raipur C.G.

---- Respondent

For the Appellant : Smt. Savita Tiwari, Advocate.

For the Respondent : Shri Sameer Behar, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Judgment****09/01/2017**

1. This appeal has been preferred against the judgment of conviction and order of sentence passed by the Special Court on 26.08.2014, whereby appellant has been convicted under Sections 363, 366 and 376 of IPC and sentenced to undergo R.I. for 7 years with a fine of Rs.1000/-, R.I. for 7 years with a

fine of Rs.1000/- and R.I. for 7 years with a fine of Rs.1000/- respectively.

2. The facts of this case are these that Hemprakash(PW-2) informed the P.S.-Dhamtari on 13.01.2013, at about 22.30p.m. that prosecutrix (PW-9) had been for work on that day and has not returned, after searching her whereabouts the information was given in the police station, missing person report was recorded in station house diary (unexhibited). During the search of prosecutrix, she was recovered on 25.01.2013 in village-Desaee, District-Panna(M.P.) in the residence of appellant/accused person vide Ex.P-8. On the basis of inquiry report of missing person, FIR was recorded vide Ex.P-10 in P.S.-Dhamtari on 26.01.2013 and offence was registered under Section 363 of IPC and Section 3(i)(ii) under the Act, 1989. In the course of investigation, prosecutrix was medically examined, under garments of appellant was seized vide Ex.P-1, under garments of prosecutrix was seized vide Ex.P-2. For confirmation of age of prosecutrix, school transfer certificate was seized vide Ex.P-3 and school admission register of Hemaband Government Primary school was seized vide Ex.P-3(II). Appellant/accused was also medically examined and sample of semen were seized vide Ex.P-4. Spot map was prepared vide Ex.P-7 and Ex.P-9, seized under garments were

sent for examination by the Medical Officer, who advised for chemical analysis vide Ex.P-12 and Ex.P-13. One spot map was prepared Ex.P-15 by Revenue Officer, vaginal slide of prosecutrix was seized vide Ex.P-19. On the advice of doctor radiological examination of prosecutrix was carried out vide Ex.P-23, according to which, her age was reported to be below 17 years. The statements of witnesses were recorded in the investigation. On completion of investigation, charge-sheet was filed against the appellant/accused person.

3. Appellant/accused was charged under Sections 363, 366 and 376 of IPC and Section 3(i)(12) of the Act, 1989, appellant denied the charges and pleaded innocence. Prosecution has examined 15 witnesses, defence has not examined any witness on examination under Section 313 of Cr.P.C., appellant has again pleaded innocence and false implication in this case. On completion of trial, the impugned judgment was passed whereby the appellant was acquitted of charge under Section 3(i)(12) of Scheduled Cast and Scheduled Tribes Act, 1989 has been convicted and sentenced, as mentioned above.
4. The grounds in this appeal are these, that the trial Court has erred in coming to the finding of conviction. It had been very clear from the evidence on record that it was a case of consent

of prosecutrix. The finding of the age of prosecutrix, is also totally erroneous. The age of prosecutrix, at the time of incident, had been more than 18 years and she was capable of giving consent for sexual intercourse. In this case, prosecutrix accompanied the appellant of her own will and willingly resided with appellant, from where she was recovered. Hence, no case of abduction or rape against the appellant, is made out.

5. On behalf of State, it is argued that prosecution has proved its case beyond reasonable doubt. The evidence of prosecutrix (PW-9), is sufficient and reliable which inspires confidence, while has been made the basis of conviction by the trial Court. The evidence regarding the proof of age of prosecutrix, clearly establishes that prosecutrix had been below the age of 18 years. On the date of incident. Hence, even if the sexual intercourse is found to be consented, the case of abduction is clearly made out. There is no scope for interference in the impugned judgment.
6. After hearing the arguments of appellant and State and going through the material on record the question for determination in this appeal are firstly this, whether the age of prosecutrix has been proved to be below 18 years by the prosecution ? Secondly, whether prosecutrix went along with the appellant/accused of her own will and consented to sexual

intercourse ?

7. The finding of age is crucial in this case, trial Court has relied upon the entries of school register and the evidence of radiologist Dr. Pushplata Singh (PW-14), who has reported vide Ex.P-23 that the age of prosecutrix was 17 years. On the basis of school register, the finding is given that the age of prosecutrix was less than 14 years. It is submitted on behalf of the appellant that the evidence from school register cannot be accepted as proof of the age of prosecutrix. Reliance has been placed on **Ram Murti Vs. State of Haryana AIR 1970 Supreme Court (1020)**, in which it was held that unproved and unexhibited school certificate cannot be relied upon, as it cannot be treated as evidence.
8. Lalit Kumar (PW-4) has stated that vide the admission register of a primary school village-Hemaband in the entry no.1076, name of prosecutrix is entered and her date of birth is mentioned as 06.12.1999. A photocopy of this register was seized vide Ex.P-3, photocopy of entry has been marked as article 2/C, which is certified by the head Master of the said school. In cross-examination, he has stated that he was not posted in the school when this entry was made, hence, he is unable to make any statement as to actual date of birth of the prosecutrix. There is no document attached to the school

register, in proof of the date of birth entered in the register. This case is not similar to the case before Apex Court in (supra). The evidence of school register has to be considered along with other evidence brought regarding proof of age of prosecution.

9. On behalf of appellant reliance has been placed on **Jaya Mala Vs. Home Secretary Govt. of J & K and others AIR 1982 Supreme Court (1297)**, in which it was held that a judicial notice can be taken that margin of error in age of appellant by radiological examination is two years on either side. Hence, the age on the basis of radiological examination, which is reported as 17 years with the margin of error of two years comes out to be about 19 years. It is also submitted that Dr. Rajani (PW-8) has stated that on examining prosecutrix, it was found that her breast were fully developed, axillary hairs were fully developed, hymen was absent and no definite opinion was given regarding her being subjected to sexual intercourse vide her report Ex.P-11, it has been argued that prosecutrix was physically developed, hence, the evidence regarding her age led by the prosecution cannot be relied upon.
10. Dr. Pushplata Singh(PW-14) has after radiological examination opined vide her report Ex.P-23, that the age of prosecutrix was less than 17 years. In cross-examination, she has denied that

the age of prosecutrix could be between 15 to 17 years, the opinion of a radiologist cannot be regarded as final as laid down by the Apex Court in (supra). A margin of 2 years can be added either side of the reported age, hence, in this case on suspecting 2 years the age of prosecutrix can be 15 years and on adding 2 years the age of prosecutrix can be 19 years. It is a question for determination that in this case on which side the margin of error shall be applicable.

11. In the case of **Babloo Pasi Vs State of Jharkhand & another, (2008) 13 SCC 133**, it was held by the apex Court that radiological examination is useful guiding factor for determining the age of person but it is not controvertible. In **State of U.P. Vs. Chhoteylal, AIR 2011 SC 697**, it was held by the apex Court that there is no such rule much less absolute one that two years have to be added to age of determined by doctor. In the judgment of **State of Karnataka Vs. Bantara Sudhakara @ Sudha & others, (2008) 11 SCC 38**, three judges bench has held that, merely because the doctor's evidence showed that the victims belongs to the age group of 14 to 16, to conclude that the two years' age has to be added to the age upper age-limit was without any foundation.
12. The school register of that the age of birth of prosecutrix is 06.12.1999, on that basis on the date of incident 13.01.2013

the age of prosecutrix appears to be below 13 years, to arrived at a finding other evidence in this respect also needs consideration Sushila(PW-6) mother of prosecutrix has stated in Para-3 that age of her daughter was between 13 and 14 years. Prosecutrix (PW-9) herself has stated that her age is 13 years an assumption made by the Court regarding the age of presecutrix was 14 years.

13. It is now well settled that on the basis of margin of error, it is not mandatory to add or subtract the age determined in the ossification test. The reliance of appellant on Jayamala (supra) cannot be followed in view of judgment of three judges Bench or apex Court in Ram Murti (supra). Considering the evidence on record the margin of difference between the date of birth of prosecutrix as proved by the prosecution and the opinion of doctor given in the ossification test, a reasonable approach has to be taken to arrive at finding. The date of birth as per school register has been supported by the mother of prosecutrix Sushila (PW/6) in her statement, whereas the age on the basis of ossification test opined by doctor is just an opinion evidence. For these reasons, it is better suited to follow the evidence on the basis of school register as mother of prosecutrix has better knowledge about the age of prosecutrix. Hence, for these reasons the finding of the trial Court that age of proseuctirx at

the relevant time had been about 14 years is a correct finding which needs no interference.

14. The ground of appeal that prosecutrix accompanied the appellant on her own will and consented to reside and cohabit with appellant. On the basis of this ground, it is clear that there is no change to the prosecution version that prosecutrix went with appellant on 13.01.2013 and resided with appellant in village Desae, District-Panna until she was recovered on 25.01.2013.

15. Prosecutrix (PW/9) has stated that when she resided with appellant for 13 days, during this period, appellant committed rape with her, no question has been put in her cross-examination to contradict the statement in her examination-in-chief. Sushila (PW/6) has stated that after recovery of prosecutrix, when she inquired from her, she was informed that appellant kept the prosecutrix as his wife and had physical relation with her. No question was put to her in cross-examination to rebut this statement given by her. Dr. Rajani Chourasiya (PW/8) examined the prosecutrix and vide report Ex.P/11 had opined that sexual intercourse may have happened with prosecutrix.

16. Learned counsel on behalf of appellant argued that medical

evidence does not support the charge of rape, is of no consequence. The opinion given by doctor is sufficient that prosecutrix may have been subjected to sexual intercourse. After the finding regarding the age of prosecutrix given by the trial Court and affirmed by this appellate Court, the consent by prosecutrix for sexual intercourse is immaterial, hence, as per the definition under Section 375 of IPC prosecutrix being below the age of 18 years on the relevant date and span of time, her subjection to sexual intercourse by the appellant amounts to offence of rape.

17. On the basis of finding arrived at this appeal and the reason aforementioned, there is no substance in this appeal, the finding of conviction and the order of sentence has no infirmity.

18. Accordingly, the appeal is dismissed.

Sd/-
(Rajendra Chandra Singh Samant)

Judge