

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 10-10-2018

Pronounced on 12-10.2018

CRIMINAL APPEAL No. 1585 of 1999

(Arising out of judgment of conviction and order of sentence dated 12.05.1999 passed by the Addl. Sessions Judge, Bemetara, District - Durg (CG) in ST No. 479/1996)

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Pannalal aged 35 years son of Kashiram Gumasta, Watchmaker, resident of village Bandhi, OP Dadhi, Police Station Nawagarh, Distt. Durg (MP) Now CG

---- Appellant

-Versus-

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For appellant	: Ms. Seema Singh, Advocate
For Respondent/State	: Mr. S.K. Mishra, Panel Lawyer

Hon'ble Mr. Sharad Kumar Gupta, Judge
C.A.V. JUDGMENT

1. In this criminal appeal, challenge is levied to the judgment of conviction and order of sentence dated 12.05.1999 passed by the Addl. Sessions Judge, Bemetara, District - Durg in ST No. 479/1996 whereby and whereunder he convicted and sentenced the appellant as under:-

Section	Sentence	Fine	Default clause in payment of fine
366 IPC	5 years RI	Rs.500/-	Additional 2 months RI
376(1) IPC	7 years RI	Rs.500/-	Additional 2 months RI

Both the substantive jail sentences are directed to run concurrently.

2. In brief, prosecution story is that prosecutrix was resident of village Dadhi. Her date of birth is 28.02.1978. Appellant

used to go to the house of prosecutrix. On 10.07.1996, in the night prosecutrix was sleeping in the house along with her grandmother, elder sister. Appellant entered in the house and sniffed something to the prosecutrix. He took her to Umaria, Dashrangpur, Jabalpur, Mandla, in a court, and Kawardha. He had committed repeated sexual intercourse with her on pretext of marriage. After recovery of prosecutrix her father took back her to his house. On 21.07.1996 FIR was lodged in outpost Nawagarh. After completion of the investigation, a charge sheet was filed against the appellant. Trial Court framed the charges against the appellant under Sections 450, 366 and 376 of the IPC. The appellant abjured the charges and faced trial. To bring home the charges, prosecution examined as many as 15 witnesses. The appellant did not examine any witness in his defence. After conclusion of the trial, the trial Court acquitted him of the offence punishable under Section 450 of the IPC but convicted and sentenced the appellant as mentioned above.

3. Being aggrieved, the appellant has preferred this criminal appeal.
4. Ms. Seema Singh, counsel for the appellant vehemently argued that the prosecution has failed to prove that at the time of the first alleged incident, the prosecutrix was below 18 years of age. Materials available on record are sufficient to show that the prosecutrix was a consenting party. Thus the conviction and sentences of the appellant may be set aside and he may be acquitted of the aforesaid charges.

5. Mr. S.K. Mishra, Panel Lawyer appearing for the State while supporting the impugned judgment submitted that conviction and sentences of the appellant are based on the cogent evidence adduced by the prosecution. Thus no interference is called for by this Court and the appeal deserves to be dismissed.
6. First point for consideration before this Court is as to what was the age of the prosecutrix on 10.07.1996.
7. PW1 prosecutrix says in para 3 that at the time of the incident her age was 14 years.
8. P.W. 5 Vaidehi Mishra who is the mother of the prosecutrix says in para 6 on 24-2-1998 during her cross examination that her third daughter Mamta is aged about 18 years. She says in para 1 that prosecutrix is the second daughter. As per the alleged seizure Ex. P-3, in seized Kotwari Birth Register the date of birth of the prosecutrix is mentioned as 28.02.1978. As per this entry the prosecutrix was more than 18 years old on 10-7-1996. Moreover, as per the alleged report of the Radiologist Ex. P-12 age of the prosecutrix was approximately 19 years. In these circumstances, this Court disbelieves aforesaid statement of para 3 of the prosecutrix and finds that prosecution has failed to prove that on 10.07.1996 prosecutrix was below 18 years of age.
9. PW1 prosecutrix says in para 1 of her statement given on oath that appellant had pressed her mouth, lifted her. But this is not the prosecution case.
10. Second question for consideration before this Court is as to

whether prosecutrix was a consenting party.

11. In **Rajkumar Bajaj @ Raja v. State of C.G. [2012 (4) CGLJ 437]**

the learned Single Judge of this Court has observed in para-9 as under :-

“9. Minute examination of the evidence of the witnesses particularly that of the prosecutrix (PW-3), her parents (PW-1 and PW-2) and Laxmi Bai (PW-9) goes to show that she (prosecutrix) was a consenting party. Evidence further shows that the prosecutrix lived in the house of Dhaniram (PW-4) along with accused Raja for five days and used to go out for answering the call of nature and fetching water from the hand pump but during this long period she, in spite of having full opportunity, did not make any complaint to anyone about her being confined by the accused/appellant Raja. This conduct of the prosecutrix also makes it clear that she was consenting party to the act of accused/appellant Raja. Now the only question is regarding her age. Prosecution has filed photocopy of the *Kotwari* register (Ex. P-15-A) but even this document has not been proved by the prosecution in accordance with law. Original *Kotwari* register has not been produced in the Court by the prosecution nor there is any evidence to show as to on what basis the date of birth of the prosecutrix was entered in the said *Kotwari* register as 20.07.1980. Even the parents of the prosecutrix have not stated anything regarding the age of the prosecutrix. Moreover, the doctor (PW-8) who medically examined the prosecutrix has stated that she was a fully grown up woman. Though the record shows that prosecutrix was referred for x-ray for determination of age, there is no such report on record”

12. In **Subelal (supra)** in para-12 the learned Single Judge has observed as follows:-

“12. Now we shall examine the conduct of the prosecutrix. The case of the prosecution is that the prosecutrix accompanied the appellant and she went from village Zoratarai to village Bhakara on his bicycle. From Bhakara,

they boarded a bus and went to Dhamtari. Further, from Dhamtari, they went to village Utai to the house of the sister of the appellant, they again boarded a mini bus and went to Bhilai (Power House). The appellant took the prosecutrix to the house of his other sister who was residing in Bhilai. The prosecutrix alleges that she was subjected to forcible sexual intercourse by the appellant in the house of his sister. Though the prosecutrix visited many places with the appellant, but she did not make any compliant and accompanied him in normal manner. This shows that she was not abducted and was not taken by force and she accompanied the appellant on her own will and it was not a case that the appellant committed sexual intercourse without her consent. Considering the evidence of age and conduct of the prosecutrix, I am of the view that the prosecutrix was a consenting party with the appellant and in the above facts and circumstances of the case, the offences u/ss 363, 366 & 376 Indian Penal Code would not be made out against the appellant. ”

13. In the matter of **Yedla Srinivasa Rao -v- State of AP** [(2006)8 Supreme 326], and in the matter of **Deepak Gulati -v- State of Haryana** (2013 AIR SCW 2987) Hon'ble Supreme Court held that question for consideration was when accused committed sexual intercourse with the prosecutrix holding out a promise for marriage whether that would amount to a consent or not. Intention of accused from the beginning was not honest, at the initial stage accused had no intention to keep promise, intention of the accused was malafide and that he had clandestine motive, such consent could not be said to be consent because she was under misconception of fact that accused intended to marry her who was of tender age, therefore she has submitted to sexual intercourse with him.

14. P.W. 1 Prosecutrix says in para 1 and 7 that appellant had

taken her to village Pipariya by bicycle and they stayed in the house of his maternal aunt. Appellant had taken her to Bilaspur where they stayed in a lodge. The appellant had taken her to Amarkantak by Sarnath Express, where they stayed in a lodge. They visited the sight seeing places at Amarkantak. As per the prosecution story they had gone to Jabalpur and stayed in hotel, they went to a Court, they visited Bhedaghat, Dhuandhar and had a photograph. They went to Mandla and Kawardha. From alleged taking till recovery of the prosecutrix, she had not complained to anyone against the appellant, though she had opportunity to do so. For not doing so, there is no reasonable explanation. She even did not make any hue and cry and sought help from anyone during visiting public places.

15. There is no such evidence available on record on strength of which it can be said that the intention of the appellant right from the beginning was not bonafide and he had made a false promise to marry her, from the initial stage he had no intention to marry with her.
16. Looking to the above-mentioned facts and circumstances, looking to the judicial precedent laid down by Hon'ble Supreme Court in **Rajkumar Bajaj** (supra), **Subelal** (supra), **Yedla Srinivasa Rao** (supra) and **Deepak Gulati** (supra), this Court finds that prosecutrix was a consenting party.
17. As per the provisions of Section 375 of the IPC, Sixthly [the Criminal Law (Amendment) Act, 2013 came into force on 3rd day of February, 2013] a man is guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 18 years of age. Before this amendment

for constituting this offence the age of prosecutrix was under 16 years.

18. This has been earlier decided that prosecutrix was consenting party, on 10-7-1996 she was not below the age of 18 years.

19. After the appreciation of the evidence discussed herebefore, this Court finds that prosecution failed to prove beyond reasonable doubt the charges punishable under Section 366, 376 of the IPC. Thus, the trial Court committed illegality in convicting and sentencing the appellant for the offences punishable under Sections 366 and 376(1) of the IPC. Hence, the appeal is allowed. The impugned judgment of conviction and order of sentence are hereby set aside. The appellant is acquitted of the charges punishable under Section 366 and 376(1) of the IPC extending the benefit of doubt.

20. The fine amount if deposited by the appellant be refunded to him after expiry of prescribed period for further remedy available to parties.

21. The appellant is on bail. The bail bond of the appellant stands discharged subject to the provisions contained in Section 437-A of the Cr.P.C.

Sd/-
(Sharad Kumar Gupta)
Judge