

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1907 of 1999**

- Suresh Kumar Satnami

---- Appellant**Versus**

- State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellant
For Respondent-State

Shri Vishnu Koshta, Advocate
Shri Bhaskar Payashi, PL

Hon'ble Shri Justice Prashant Kumar Mishra**Order On Board****22/03/2018**

1. The appellant has assailed the legality and validity of the impugned judgment of conviction, whereby the trial Court has convicted him for committing offence under Section 376 IPC and has sentenced him to undergo RI for 7 years and fine of Rs.1,000/-, in default of payment of fine to undergo additional SI for 6 months.
2. The prosecutrix (PW-5) lodged an FIR on 31.07.1997 alleging that about 4 months back, the appellant came to her house in the absence of her mother and committed forcible sexual intercourse on promise to marry. The appellant committed sexual intercourse twice on the first occasion and thereafter continued to commit

sexual intercourse on promise to marry.

3. During the investigation, the prosecution recovered her mark sheet of 5th Class as Article-A, wherein the date of birth of the prosecutrix is mentioned as 09.03.1983. During the medical examination, the prosecutrix was found to be habitual in performing sexual intercourse, however, she was not referred for radiological examination for ascertaining her age. Vide Ex-P-2, she was referred for medical examination for ascertaining the pregnancy. It is the case of the prosecution that when her menstrual cycle stopped and the prosecutrix was confronted by her mother on this aspect of the matter, she revealed that the appellant has committed forcible sexual intercourse on promise to marry. The radiological examination was suggested to ascertain the pregnancy and not for ascertaining the age.
4. Admittedly, the FIR is delayed by about 4 months. In the FIR, the reason for delay is mentioned as 'due to promise to marry', however, there is no evidence that the prosecutrix ever insisted on the appellant to marry her after the first sexual intercourse was committed.
5. A close scrutiny of her deposition would establish that the prosecutrix did not resist at the time of performing sexual intercourse by the appellant. She allowed the appellant to repeat the act of sexual intercourse on number of occasions. The incident has happened in her own house and it is not a case where the prosecutrix was enticed or kidnapped. When the first sexual intercourse took place, she was with Chanda Bai, the

tenant, in one room and when the appellant reached at the place, after sometime, the appellant took her to another room, bolted the door from inside, undressed her and performed sexual intercourse. She also states that the appellant used to stay in her house for the entire night and return to his house at 4 am in the early morning. She did not disclose the incident to her mother when she came back from another village. Her mother came to know about the incident only when she asked about the reason for non occurrence of menstrual cycle. Thus, the prosecutrix appears to be a consenting party and the sexual intercourse was consensual.

6. This Court is therefore required to consider as to whether the prosecution has been able to establish that the prosecutrix had not attained the age of 16 years on the date of incident.
7. The Investigating Officer (IO) has recovered the 5th Standard Mark Sheet of the prosecutrix, wherein her date of birth is mentioned as 09.03.1983. This mark sheet has been proved by PW-8 Ganga Maheshwari, a Teacher/In-charge Headmaster of the school. This witness has only proved that the certificate has been issued by her school, however, she was not able to certify as to on what basis the entry concerning date of birth was made in the school register. She admits that ordinarily, the entry of date of birth is made in the school register on the basis of affidavit of the parents, however, no such affidavit has been produced before the trial Court. This witness has not herself entered the date of birth of the prosecutrix in the school register, from which it has

been copied in the mark sheet. The person who has made that entry or the source where from the date of birth came in the knowledge of the person who has made the entry, has not been established by the prosecution. Even if the mark sheet was recovered by the IO, the prosecutrix should have been referred for ossification test to ascertain the age of the prosecutrix so that the evidence regarding age mentioned in the mark sheet is duly corroborated by the medical evidence, however, unfortunately, the prosecutrix has not been subjected to ossification test.

8. Considering the nature and quality of evidence available concerning the age of the prosecutrix, the prosecution has failed to establish that she was less than 16 years of age on the date of incident. It is also to be noticed that the mother of the prosecutrix has been examined as PW-6 Daya Bai, however, she has only stated in her examination in chief that on the date of incident, her daughter's age may be 14 years. This lady was earlier married to one Khorbahra, with whom she had no issues. Shivnandan is therefore her second husband. There is no evidence in the record as to the date of her marriage with Shivnandan nor there is evidence as to the number of children she has given birth out of her relation with Shivnandan. Shivnandan himself has not been examined by the prosecution. Daya Bai has not stated that she had gone to the school to admit her daughter and that the date of birth mentioned in the mark sheet was informed by her or by her husband Shivnandan.

9. In the absence of proof of age of the prosecutrix that she was less than 16 years of age, the sexual intercourse between the appellant and the prosecutrix being consensual, no offence is made out against the appellant. The finding of guilt and sentence recorded by the trial Court against the appellant deserves to be and is hereby set aside. The appeal stands allowed.
10. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of 6 months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the Higher Court as and when required.

Sd/-

Judge
Prashant Kumar Mishra

Nirala