

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1487 of 2000

Judgment Reserved on : 30.1.2018

Judgment Delivered on : 26.4.2018

Prakash, son of Aaskaran Gadha, aged about 19 years, resident of Village Patpar, P.S. Chowki Chichaula, District Rajnandgaon, M.P. (now Chhattisgarh)

---- Appellant

versus

The State of M.P. (now Chhattisgarh) through Police Station Churia, District Rajnandgaon

--- Respondent

For Appellant : Ms. Sharmila Singhai with
Shri Sanjay Agrawal, Advocates
For Respondent/State : Shri Rajkumar Jaiswal, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment dated 26.5.2000 passed by the Sessions Judge, Rajnandgaon in Sessions Trial No.24 of 2000 convicting and sentencing the Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 7 years, and fine of Rs.400/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years, and fine of Rs.300/- with default stipulation
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 2 years, and fine of Rs.200/- with default stipulation

2. Facts of the case, in brief, are that on 6.7.1999, First Information Report (Ex.P1) was lodged by Rajbhan Singh (PW8), maternal

grandfather of the prosecutrix (PW3), aged about 14 years alleging that the prosecutrix was living with him. In the night of 4.7.1999, she was studying at home till 11:00 p.m.. Next day, at about 5:30 a.m., she was not found at home and she had absconded. A boy of the village, namely, Prakash (the Appellant) had also absconded from the village. Two love letters written by the Appellant were found in the books of the prosecutrix. Both the letters were seized vide Ex.P6. On 22.8.1999, the prosecutrix was recovered from the hut of the Appellant situated at Nagpur (Maharashtra). Statements of the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. The prosecutrix was medically examined by Dr. Jyoti Sadani (PW6). She gave her report (Ex.P13) in which she stated that she did not find any injury on the body of the prosecutrix. She further stated that she could not give any definite opinion regarding rape with the prosecutrix. Secondary sexual characters of the prosecutrix were fully developed. Two fingers were easily being inserted in the vagina of the prosecutrix. Regarding age of the prosecutrix, birth registration register (Ex.P14) has been submitted by the prosecution in which her date of birth is mentioned as 1.11.1984. On completion of the investigation, a charge-sheet was filed against the Appellant for offence punishable under Sections 363, 366 and 376 of the Indian Penal Code. Charges were framed against him under Sections 363, 366 and 376 of the Indian Penal Code.

3. To rope in the Appellant, the prosecution examined as many as 11 witnesses. Statement of the Appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the guilt and pleaded innocence. No witness has been examined

in his defence.

4. The Trial Court convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant argued that from the evidence on record, it is clear that there was a love affair between the prosecutrix and the Appellant and due to that relationship, the prosecutrix herself left her home and absconded with the Appellant. On the date of incident, she was aged more than 16 years. There is nothing on record to show that she was below 16 years of age on the date of incident. Since she was a consenting party and her age is not proved to be below 16 years on the date of incident, no case is made out against the Appellant. Reliance was placed on **ILR 2017 Chhattisgarh 2241 (Vinod Kumar v. State of Chhattisgarh)**, **AIR 1988 SC 1796 (Birad Mal Singhvi v. Anand Purohit)** and **(2010) 1 SCC 742 (Sunil v. State of Haryana)**.
6. On the contrary, Learned Counsel appearing for the State supported the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record minutely.
8. Constable Narendra Kumar (PW1) is the witness who had taken the diary of unnumbered FIR (Ex.P1) recorded in Police Chowki Chichaula to Police Station Chhuria for registration of a numbered FIR, which was registered there as Ex.P2. Rajbhan Singh (PW8), maternal grandfather of the prosecutrix has stated that on 4.7.1999, the prosecutrix was studying at home till 11:00 p.m. Next

morning, at about 5:30 a.m., she was not found at home. He also came to know that one boy of the village (the Appellant) was also not found in the village. On making search in the books of the prosecutrix, two love letters were found which were written by the Appellant. He reported the matter vide Ex.P1 and vide seizure memo (Ex.P6), both the letters (Articles A and B) were seized. Kejauram (PW2), uncle of the prosecutrix has also supported the above statement of Rajbhan Singh (PW8) and stated that the police had seized the letters (Articles A and B) vide Ex.P6. He has further stated that after one month of the incident, he had gone to Nagpur along with police officials where the prosecutrix was found in the house of the Appellant. He and the police officials returned along with the prosecutrix.

9. Dr. Jyoti Sadani (PW6) medically examined the prosecutrix on 23.8.1999. Her report is Ex.P13. She has stated that she did not find any internal or external injury on the body of the prosecutrix nor on her private part. Two fingers were easily being inserted in the vagina of the prosecutrix. Secondary sexual characters were fully developed. She found no positive evidence regarding recent sexual intercourse with the prosecutrix. She has stated that no definite opinion could be given regarding rape with the prosecutrix. The Appellant was medically examined by Dr. A.K. Bansod (PW4). His report is Ex.P8. Dr. Bansod has stated that in the examination, he found the Appellant capable of performing sexual intercourse.
10. The prosecutrix (PW3) has stated that in the night at about 1:00 a.m, when she came out of her house to attend the call of nature, the Appellant came there and gagged her mouth with a handkerchief. When she tried to shout, he threatened her of life

and threatening her, he took her to the hill of Dongargarh, where, even after her refusal, he committed sexual intercourse with her. Thereafter, he took her to Dongargarh Railway Station. They stayed at the railway station for the whole night. Next morning, they went to Nagpur by train. At Nagpur, the Appellant went out in search of a job. Thereafter, they began to live together there. During that period, the Appellant kept on committing sexual intercourse with her. She has admitted that the letters (Article A and B) were written by the Appellant. The fact that on 4.7.1999, in the night, the Appellant, threatening her, took her away with him is not mentioned in her case diary statement (Ex.D3). In paragraph 17, she has admitted that she stayed with the Appellant at Nagpur for about 40 days, but she never made any complaint to anyone at Nagpur regarding the incident.

11. Inspector Nicolas Khalkho (PW7) has stated that he recorded numbered FIR (Ex.P2) on the basis of Ex.P1. Assistant Sub-Inspector S.R. Dhuware (PW10) is the witness who investigated the offence in question. Constable Samaru Ram (PW11) has stated that on 22.8.1999, he had gone to the hut of the Appellant situated at Nagpur. On his reaching to the hut, the Appellant had run away from there. He had found the prosecutrix in the hut. He had taken her back from there.
12. Though the prosecutrix (PW3) has stated that in the night at about 1:00 a.m., gagging her mouth with a handkerchief, the Appellant took her away forcibly from her house to the hills of Dongargarh and committed sexual intercourse with her in the hills of Dongargarh and thereafter also so many times at Nagpur without her will and consent yet her above statement is not reliable

because from the statements of her uncle Kejauram (PW2) and her maternal grandfather Rajbhan Singh (PW8), FIR (Ex.P1) and the love letters (Articles A and B) seized vide Ex.P6, it is clear that there was a love relation between the prosecutrix and the Appellant and due to the said relation, she herself left her house and went away with the Appellant. Had she been taken away forcibly and sexual intercourse would have been committed with her without her will and consent, she would have disclosed the incident during journey from her village to Nagpur and during her 40 days' stay with the Appellant at Nagpur to nearby people as she had ample opportunity to do so but she did not disclose the incident to anyone nor did she even shout or raise any alarm and she was recovered from the hut of the Appellant situated at Nagpur. Thus, she was a consenting party to the incident.

- 13.** The prosecutrix (PW3), in her Court statement, has stated that her date of birth is 1.11.1984. Kejauram (PW2) and Rajbhan Singh (PW8) have also stated that the date of birth of the prosecutrix is 1.11.1984. Mother and father of the prosecutrix have not been examined by the prosecution. Though Kejauram (PW2) has stated that the date of birth of the prosecutrix is 1.11.1984 yet he has been unable to state the date of birth of his own four children. Similarly, Rajbhan Singh (PW8) has admitted that birth of the prosecutrix had taken place at Village Patharatola. He has admitted that he did not know who recorded the birth entry of the prosecutrix in the kotwari register.
- 14.** Head Constable Bhikham Singh (PW9) is the witness who brought the birth registration register (Ex.P14). In the said register, the date of birth of the prosecutrix is mentioned as 1.11.1984. As per

the entries made in Ex.P14, the name of informant is mentioned as P.R. Chandrawanshi and place of birth of the prosecutrix is mentioned as Jaisinghtola. Bhikham Singh (PW9) has admitted that he is unable to explain about who got the entries recorded. As per the statement of Rajbhan Singh (PW8), maternal grandfather of the prosecutrix, the birth of the prosecutrix took place at Village Patharatola. Bhikham Singh (PW9) has categorically stated that as per entries of Ex.P14, birth place of the prosecutrix is not Village Patharatola, but is Village Jaisinghtola. Statements of mother and father of the prosecutrix under Section 161 of the Code of Criminal Procedure have not been recorded by the prosecution nor their statements are recorded in the Court. Why were their statements not recorded is not explained by the prosecution.

15. From the above, it is clear that except the entries of Ex.P14, there is no other documentary evidence available regarding date of birth of the prosecutrix. No kotwari register was seized. No ossification test of the prosecutrix was conducted by the prosecution. It is settled legal position that the date of birth mentioned in the school register or any such document has no evidentiary value unless the person who made the entries or who gave the date of birth is examined. Merely proof of such document would not tantamount to proof of all the contents or the correctness of date of birth stated in the document. In **Birad Mal Singhvi case** (supra), the Supreme Court has observed thus:

“14. 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 by

someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents such as extract of School Register, mark list or certificate of Education Board etc. are proved, it does not mean that the contents of documents are also proved. Mere proof of such documents would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.”

The above observation has been reiterated by the Supreme Court in **Sunil case** (supra).

16. In the instant case, from the record, it appears that there is no conclusive proof of legally admissible evidence in relation to age of the prosecutrix which could suggest that on the date of incident she was minor. Though oral statements have been made by the prosecutrix, her maternal grandfather and uncle that she was minor at the relevant point of time and as per the entries of birth registration register (Ex.P14) her date of birth is 1.11.1984 yet the prosecution has failed to prove as to on what basis the said date of birth of the prosecutrix was recorded in Ex.P14. Mother and father of the prosecutrix have not been examined by the prosecution. Name of the informant in Ex.P14 is mentioned as P.R. Chandrawanshi. No evidence is available on record that the name of father of the prosecutrix is P.R. Chandrawanshi. Even ossification test of the prosecutrix has not been done to determine her age.
17. From the above discussion, I find that no case is made out against the Appellant.

18. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charges framed against him.
19. It is reported that the Appellant is on bail. His bail bonds shall continue for a further period of six months from today in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
20. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-
(**Arvind Singh Chandel**)
JUDGE