

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 06.04.2018****Pronounced on 19.04.2018****CRIMINAL APPEAL No. 1282 of 1999**

- Santosh Kumar S/o Shri Sadhu Ram Satnami, aged about 20 years, R/o Khandaspot Thana Barela, District – Durg, M.P. (Now C.G.)

---- Appellant**Versus**

- State of M.P. (Now C.G.)

---- Respondent

For appellant : Shri K.K. Singh and Shri Parag Kotecha, Advocates
 For Respondent/State : Shri Lav Sharma, 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 31.03.1999 passed by the Additional Sessions Judge, Bemetara District - Durg in Sessions Trial No. 164/1998 whereby and whereunder he convicted and sentenced the appellant as under:-

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, Indian Penal Code (for short 'IPC')	RI for 3 years + fine of Rs. 200/-	Additional RI for 3 months
2.	366, IPC	RI for 3 years + fine of Rs. 200/-	Additional RI for 3 months
3.	376, IPC	RI for 7 years + fine of Rs. 200/-	Additional RI for 3 months

All the substantive jail sentences have been directed to run concurrently.

2. In brief, the prosecution story is that prosecutrix at the time of alleged incident was aged near about 13 years, she was resident of village Gutheli. She was studying in class sixth. On 09.02.1998, she had gone to her village school. Near about 1 pm she felt stomach pain, thus after obtaining leave, she left school and went to village pond. When she was returning back from the pond to school, on the way, appellant who was along with bicycle told her that he would marry her, thus asked her to come and sit on his bicycle. Prosecutrix thereafter, moved by this incitement, sat on his bicycle. Appellant took her to his brother-in-law's house at village – Banbarad where the appellant committed sexual intercourse with prosecutrix on the pretext of marriage. On 11.02.1998, prosecutrix and appellant enjoyed a fair at village Banbarad. In the evening, her father searching her reached there and took her back. Being night at that time, prosecutrix went to PS Berala on 12.02.1998 where she lodged FIR vide Ex.P/1. During investigation PW 13 Sub Inspector J.S. Chouhan, PS Berla seized one underwear from prosecutrix vide Ex. P/2 and one underwear from appellant vide Ex. P/3. He sent the prosecutrix and her aforesaid underwear for medical examination. PW 7 Dr. Smt. Sugam Sawant examined prosecutrix and gave report vide Ex. P/5. The said lady doctor also examined the seized underwear of prosecutrix and gave report vide Ex. P/6. PW 8 Dr. M.C. Patela examined seized underwear of appellant and gave report vide Ex. P/7. Said doctor also examined appellant and gave report vide Ex. P/8. During the investigation the statements of witnesses have been also recorded under Section 162

Cr.P.C. Spot map was prepared by the investigating officer. PW 12 Dr. A.D. Urgaonkar examined x-ray film of prosecutrix and gave opinion vide Ex. P/11. Two sealed slides were also seized vide Ex. P/16. From PW 6 Suresh Kumar, the Lecturer and In-charge Principal, Government Higher Secondary School, Gutheli birth certificate of prosecutrix was seized vide Ex. P/17. Birth certificate of prosecutrix is Ex. P/4-C. Spot map was also prepared by Patwari. Seized underwear, slides were sent to RFSL. RFSL report is Ex. P/21. After completion of the investigation, the charge-sheet was filed against appellant under Section 363, 366, 376 IPC. The trial Court framed charges against appellant under Section 363, 366, 376(1) IPC. Appellant abjured the charges and faced trial. To bring home the charges, the prosecution examined as many as 13 witnesses.

3. Appellant did not examine any witness on his defence. The defence of appellant is that his father's paddy was kept in the custody of prosecutrix's father, therefore to escape from returning back the same, he has been falsely implicated in the case.

4. Shri K.K. Singh and Shri Parag Kotecha, counsel for the appellant strenuously argued that the prosecution has failed to prove that the age of prosecutrix was below 18 years. Prosecutrix was the consenting party. Thus, aforesaid conviction and sentence are bad in the eyes of law and not sustainable. Thus, aforesaid conviction and sentence may be set aside.

5. Shri Lav sharma, Panel Lawyer for the State submitted that aforesaid conviction and sentence are based on clinching evidence led by the prosecution. He supported the aforesaid conviction and sentence and submitted that no interference is called for by this Court.

6. The first and foremost question for adjudication before me is, what was the age of prosecutrix on 09.02.1998?

7. Shri K.K. Singh and Shri Parag Kotecha, counsel for appellant placed reliance on para 6 of **Akeel v. State of M.P.** [1998 (2) MPLJ 199} relevant portion is extracted below:-

“6. ... it is well known that the determination of age by ossification test is neither absolute nor exact.....

School leaving certificate cannot form the basis to determine the age as the guardians have tendency to understate the age of their children at time of admission in school.....”

8. As per the birth certificate Ex. P/4-C the date of birth of prosecutrix is 26.06.1985 issued on the basis of the entry at serial number 2160 of the Dakhil Kharij Register.

9. In **Birad Mal Singhvi v. Anand Purohit {AIR 1988 SC 1796}** the Hon'ble Supreme Court observed in paras-14 and 15 as under:

“14.....If the entry in the scholar's register regarding date of birth is made in 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 Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.

15. 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 enjoined 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.”

10. In **Babloo Pasi v. State of Jharkhand and Another** {2008 AIR SCW 7332}, Hon'ble Supreme Court in para 22 observed as under:-

“22. Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined 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 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.”

11. It would be manifest to refer para-25 of the judgment of the Supreme Court in **Sunil v. State of Haryana {2010 (1) SCC 742}** which is extracted as under:-

“25. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.”

12. In **Subelal v. State of M.P. (Now C.G.) {2011(4) CGLJ 424}** the learned Single Judge of this Court has observed in para 9 as under :-

“9. In *Alamelu and another Vs. State represented by Inspector of Police*, (2011) 2 SCC 385, the Supreme Court held that the transfer certificate which is issued by a government school and is duly signed by Headmaster would be admissible in evidence u/s 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary

value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The Supreme Court held that – 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. In the present case, though PW-10 admitted to issue the transfer certificate (Ex.P/15) on the basis of entry in the school register, but the entry in the school register, by which, the prosecutrix was admitted in Class-6th, itself was not proved.

13. In the matter of **State of Madhya Pradesh v. Munna @ Shambhoo Nath** in **Criminal Appeal No. 658 of 2011** decided on 18.09.2015 the Hon'ble Supreme Court has observed that the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Further the Hon'ble Supreme Court has observed that to prove its case, the prosecution produced evidences including school certificate, opinion of the doctor who conducted medical examination of the prosecutrix, bone ossification test but since the doctor was not examined the High Court held that none of them could bring home the case of the prosecution. The prosecution produced school certificate of the prosecutrix and examined the Principal of Babu Manmohandas Hitkarini Girls Higher Secondary School, Dixitpura (PW1), where the prosecutrix studied in her 9th standard. In his cross-examination, PW1 stated that the age of the prosecutrix was noted at the time of admission but he had no

knowledge about the fact as to what date of birth would have been mentioned in her letter of declaration. The examination-in-chief of PW8 (Dr. Nisha Sahu) does not support the prosecution story. In her opinion, the girl could not have attained the age of 14 years, but further in her examination-in-chief and cross-examination, she stated that she could not opine about the present intercourse. Other findings of PW8 are mere opinions and cannot be relied upon completely to establish the guilt of the accused.

14. In the case in hand, the prosecution failed to examine any person who had special means of knowledge of the aforesaid date of birth of prosecutrix which he/she had informed at the time of said entry to the concerned authority which has been written in the declaration form, that could have been main source of information for the date of birth of the prosecutrix. The prosecution failed to give any explanation as to why it was not done. Moreover, prosecution failed to examine the author of the entry of the aforesaid date of birth of prosecutrix in Dakhil Kharij Register and declaration form. Looking to these circumstances and the aforesaid judicial precedents laid down in *Akeel (Supra)*, *Birad Mal Singhvi (Supra)*, *Babloo Pasi (Supra)*, *Sunil (Supra)* and *Subelal (Supra)*, this Court finds that the prosecution does not get any help from Ex. P/4-C for assessment of the age of prosecutrix.

15. As per the ossification test report Ex. P/11, PW 12 Dr. A.D Uргаonkar had examined the X-ray film of prosecutrix and opined that the age of prosecutrix is 15 years.

16. In **Jaya Mala v. Home Secretary, Government of Jammu and Kashmire And Others** {AIR 1982 SC 1297} the Hon'ble Supreme

Court has observed that margin of error in age ascertained by radiological examination is two years on either side.

17. There is no such evidence on record on the strength of which it could be said that Ex.P/11 is not believable in this reference that margin of error of two years is possible on either side.

18. During recording of the statement of PW1 prosecutrix, Court had *prima facie* estimated her age as 13 years.

19. PW1 prosecutrix says in para 1 of her statement given on oath that at the time of the incident she was studying in 6th class. She says in para 4 during her cross examination that she failed in one academic year.

20. PW2 Chhannu who is the father of prosecutrix says in para 1 of his statement given on oath that at the time of incident prosecutrix was studying in 6th class, at that time her age was 13 years. He says in para 5 during his cross-examination that prosecutrix failed in one academic year.

21. PW3 Urvashi, the mother of prosecutrix, says in para 1 of her statement given on oath that at the time of incident prosecutrix was studying in class 6th, at that time her age was 13 years.

22. As per the medical report Ex.P/5, PW7 Dr. Smt. Sugam Sawant had estimated age of prosecutrix as 13 years.

23. There is no such evidence on record on the strength of which it could be said that the aforesaid estimated age of the prosecutrix by Court, aforesaid statement of PW1 prosecutrix, PW2 Chhannu, PW3

Urvashi, aforesaid estimated age of prosecutrix by PW 7 Dr. Smt. Sugam Sawant are not natural, not simple and not normal.

24. Ex.P/11 gets corroboration from the aforesaid estimated age of prosecutrix by the Court, aforesaid statement of PW1 prosecutrix, PW2 Chhannu, PW3 Urvashi, aforesaid estimated age of prosecutrix by PW7 Dr. Smt. Sugam Sawant, thus appellant does not get any help from the aforesaid judicial precedent laid down by the Hon'ble Single Judge of MP High Court in Akeel (supra), thus, this Court believes on Ex.P/11 in this reference that there is possibility of error of two years of age on each side.

25. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that on 09.02.1998 the age of prosecutrix was below 16 years, but succeeded to prove that on that date the age of prosecutrix was below 18 years.

26. Now, the second question for adjudication before me is that whether prosecutrix was allegedly a free consenting party.

27. 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”

28. 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 complaint 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. ”

29. PW1 prosecutrix says in para 1 that appellant had given her threatening of life. PW2 Chhannu says in para 1 that prosecutrix had told him that appellant had given threatening to her. This is not the prosecution case. This is also not the prosecution case that from village Gutheli till recovery of her from village Banbarad she did not call anybody for help or shouted specially when she went with appellant at village fair, and during the alleged forcible intercourse she did not offer resistance by using force like snatching due to any reason. Looking to these circumstances and judicial precedents *Rajkumar Bajaj (Supra)* and *Subelal (supra)*, this Court finds that prosecutrix was a consenting party.

30. 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.

31. Shri K.K. Singh and Shri Parag Kotecha, counsel for appellant cited observation of the Hon'ble Supreme Court in **Amar Bahadur Singh v. State of U.P.** in para 5, relevant portion is extracted herebelow: -

“5. ...and it was perhaps when the accused and the prosecutrix had been caught red handed then the story of rape had been cooked up to salvage some of the family honour ..”

32. In the case in hand, the prosecutrix was not caught red handed. The facts of this case are different. Thus appellant does not get any help from the aforesaid judicial precedent laid down by the Hon'ble Supreme Court in **Amar Bahadur Singh (supra)** regarding alleged rape.

33. This has been earlier decided that prosecutrix was consenting party. On 09.02.1998, she was above the 16 years of age. Thus, this Court finds that the prosecution has failed to prove that the appellant had committed rape on prosecutrix.

34. PW1 prosecutrix says in para 1 that appellant had persuaded her to sit on his bicycle and then taken her away.

35. PW2 Chhannu says that prosecutrix had told him that appellant had persuaded her to sit her on bicycle and thereafter he taken her away.

36. There is no such evidence on record on the strength of which it could be said that the aforesaid statements of para 1 of PW1 prosecutrix, PW2 Chhannu are not believable. In the case in hand, there is no such evidence on strength of which it would be deemed that PW1 prosecutrix, PW2 Chhannu had stated aforesaid statements of para 1 against appellant allegedly to escape from returning back the paddy to the father of appellant. Thus, this Court believes on aforesaid statements of para 1 of PW1 prosecutrix, PW2 Chhannu.

37. As per the provisions of Section 361 any person takes or entices any male who is 16 years of age or any female who is under age of 18 years, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or such person, without the consent of such guardian, then it is said to kidnap such minor or person from lawful guardianship.

38. In the case in hand, it has been earlier decided that on 09.02.1998, prosecutrix was below 18 years of age.

39. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has succeeded to prove beyond reasonable doubt that appellant had taken away prosecutrix who was allegedly below 18 years, out of keeping of her lawful guardian PW2 Chhannu without the consent of him with an intent that she may be forced or seduced to illicit intercourse.

40. After appreciation of the evidence discussed herebefore

the conviction and sentence of the appellant under Section 376(1) IPC is hereby set aside. The conviction of the appellant under Section 363, 366 are affirmed. Section 366 IPC is the major Section and ingredients of Section 361 IPC are included in Section 366 IPC. Thus, the trial Court committed illegality in sentencing the appellant under Section 363 IPC. Thus, the aforesaid sentence of the appellant under Section 363 IPC is hereby set aside. Sentence under Section 366 IPC awarded by the trial Court to the appellant is not excessive, thus, sentence awarded under Section 366 IPC is hereby affirmed.

41. Accordingly, the appeal is partly allowed to the above extent.

42. In aforesaid circumstances, since the sentence under Section 366 IPC has been affirmed, bail and bond of the appellant are cancelled. The appellant is directed to surrender before the trial Court forthwith, the authorities concerned are also directed to take the appellant in custody forthwith, for serving the remaining part of the sentence.

Sd/-
(Sharad Kumar Gupta)
Judge