

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2427 of 1999

Judgment Reserved on : 4.1.2018

Judgment Delivered on : 3.4.2018

Ishwarlal, son of Shankarlal, aged 30 years, resident of Mudkhusra, P.S. Deori, District Durg, M.P. (now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh) through S.H.O., Police Station Deori, District Durg

--- Respondent

For Appellant : Shri P.P. Sahu, Advocate
For Respondent/State : Shri Sameer Behar, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment dated 31.8.1999 passed by the Additional Sessions Judge, Balod in Sessions Trial No.78 of 1998 convicting and sentencing the Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 376(1) of the Indian Penal Code	Rigorous Imprisonment for 7 years
Under Section 506 Part II of the Indian Penal Code	Rigorous Imprisonment for 1 year

2. Case of the prosecution, in brief, is that on 2.9.1997, the prosecutrix (PW5), aged about 15 years lodged First Information Report (Ex.P3) in Police Station Deori alleging that prior to 5 months from 2.9.1997 when she had gone to the agricultural field,

having seen her alone there, the Appellant caught her, caused her to fall down and after removing her clothes, committed forcible sexual intercourse with her. On opposing, he gagged her mouth and also threatened her of life on being disclosed the incident to anyone. Due to fear, she did not disclose the incident to anyone. Thereafter also, many times, he committed forcible sexual intercourse with her. When she became pregnant, she told the fact to her parents. Her parents called a village meeting in which the Appellant did not appear. Therefore, she lodged the FIR (Ex.P3). She was medically examined by Dr. Alpana Agrawal (PW1). She gave her report (Ex.P1) in which she stated that the prosecutrix was habitual to sexual intercourse and she was carrying pregnancy of 24 weeks. Regarding age of the prosecutrix, she opined that the prosecutrix was aged about 15-16 years. She advised for her examination by a Radiologist regarding her age. But, no radiological examination report is available on record. Regarding date of birth of the prosecutrix, school leaving certificate (Ex.P4) was obtained from Headmaster Humanlal Sahu (PW4). According to Ex.P4, the date of birth of the prosecutrix is 3.12.1982. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant for offence punishable under Sections 376 and 506B of the Indian Penal Code. Charges were framed against him under Sections 376 and 506 Part II of the Indian Penal Code.

3. To rope in the accused/Appellant, the prosecution examined as many as 12 witnesses. Statement of the Appellant was also recorded under Section 313 of the Code of Criminal Procedure in

which he denied the circumstances appearing against him, pleaded innocence and false implication. 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 the prosecutrix was a consenting party. On the date of incident, she was aged below 16 years is not proved. Dr. Alpana Agrawal (PW1) has admitted that on the date of medical examination of the prosecutrix, she had become 16 years of age. Even after being advised by Dr. Alpana Agrawal for ossification test of the prosecutrix, no ossification test report is available on record. Regarding birth of the prosecutrix, statements of her father and mother, namely, Vishal (PW7) and Narbadiya (PW9), respectively are contradictory. Thus, it is not established that the age of the prosecutrix was below 16 years. Since she was a consenting party, no case is made out against the Appellant.
6. Per contra, 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 with due care.
8. The prosecutrix (PW5) has stated that on the date of incident at about 10:00 a.m., she was working in the agricultural field. The Appellant came there, caught her and caused her to fall down and

after removing her skirt and underwear, forcibly committed sexual intercourse with her. She has further stated that on being refused, he did not stop and threatened her of life. Due to fear, she did not disclose the incident to anyone on the date of incident. She has further stated that after 8 days of the incident, she again went to the agricultural field to work. On that day also, the Appellant came there and even after refusing, he committed forcible sexual intercourse with her. Due to fear, this time also, she did not disclose the incident to anyone. When she was carrying pregnancy of about 5 months and on being asked by her parents, she disclosed about the incident. She has further stated that a village meeting was called. Thereafter, she lodged the FIR (Ex.P3).

9. Vishal (PW7), father of the prosecutrix and Narbadiya (PW9), mother of the prosecutrix have stated that when the prosecutrix was carrying pregnancy of about 5 months and on being asked, she told about the incident. Thereafter, a village meeting was convened, but the Appellant did not appear in the said meeting.
10. Savitribai (PW6) has also stated that when the prosecutrix was carrying pregnancy of about 5 months, she came to know about the pregnancy of the prosecutrix. A village meeting was convened in which the Appellant did not appear.
11. Vijay Kumar (PW11) has also stated that a village meeting was convened. He has stated that in the said meeting, the Appellant had admitted that pregnancy of the prosecutrix was from him. But, this fact is not mentioned in case diary statement of this witness and he admitted that this fact was stated by him for the first time in

the Court itself.

- 12.** Head Constable S.K. Hariharno (PW3) has stated that he recored the FIR (Ex.P3). Dr. Alpana Agrawal (PW1) has stated that she examined the prosecutrix on 2.9.1997 and gave her report (Ex.P1) in which she opined that the prosecutrix was habitual to sexual intercourse and she was carrying pregnancy of 24 weeks.
- 13.** From the above, it is clear that the alleged incident had taken place 5-6 months prior to the date of lodging of the FIR (Ex.P3). Though the prosecutrix has stated the commission of sexual intercourse with her to be forceful and she has stated that her non-disclosure about the incident to anyone was due to fear yet from her statement, it is clear that as alleged by her, the Appellant had committed sexual intercourse with her many times. During this period, she had many opportunities to disclose about the incident, but she did not disclose the incident to anyone. When she became pregnant and she was carrying pregnancy of about 5 months, she first time disclosed the incident and that too on being asked by her parents. From the above, it is clear that the prosecutrix was a consenting party.
- 14.** Since the prosecutrix was a consenting party, determination of her age is essential.
- 15.** As per the statement and opinion of Dr. Alpana Agrawal (PW1), the prosecutrix was more than 16 years of age on the date of examination and despite advice of Dr. Alpana Agrawal for ossification test of the prosecutrix, no such test was conducted.

- 16.** Headmaster Humanlal Sahu (PW4) has stated that as per the transfer (school leaving) certificate (Ex.P4) of the prosecutrix, her date of birth is 3.12.1982. He has admitted that at the time of admission of the students, the date of birth is recorded in the school record as told by the parents of the students.
- 17.** Vishal (PW7), father of the prosecutrix has stated that the prosecutrix took birth in the year 1982 and he had got entered her date of birth in the school. This witness has been unable to state about the date and month of birth of the prosecutrix. In paragraph 6 of his cross-examination, he has stated that his eldest son took birth in the year 1977, elder daughter Kamla took birth in the year 1979 and younger daughter (the prosecutrix) took birth in the year 1982. Contrary to this, Narbadiya (PW9), mother of the prosecutrix has stated that her all 3 children took birth with an interval of 1½ years. If the testimony of Narbadiya (PW9) is considered that her all the children took birth with an interval of 1½ years, the prosecutrix would have taken birth in the year 1981. Vishal (PW7) has stated that Kotwar of the village would have also recorded date of birth of the prosecutrix, but no Kotwari Book/Register has been produced on record by the prosecution.
- 18.** From the above, it is clear that except the school leaving certificate (Ex.P4), no other documentary evidence is available on record regarding the date of birth of the prosecutrix. Though the entry regarding the date of birth of the prosecutrix in the school was got recorded by her father Vishal (PW7) yet he has not been able to state about the date and month of birth of the prosecutrix. What was the actual gap between the birth of their 3 children, statements

in this regard of Vishal (PW7), father of the prosecutrix and Narbadiya (PW9), mother of the prosecutrix are contradictory.

19. From the above, it is not established beyond reasonable doubt that the prosecutrix was below 16 years of age on the date of incident. Since she was a consenting party and it is not established that she was below 16 years of age on the date of incident, the alleged offence is not made out against the Appellant.
20. Consequently, the appeal is allowed. The conviction and sentence imposed upon the Appellant is set aside. The Appellant is acquitted of the charges framed against him.
21. 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