

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.602 of 2001

Balla @ Balkumar, aged about 25 years, S/o Jagal Singh Gond, R/o Paniyajobe, P.S. Bortalao, At present R/o Katli, Dongargarh, District Rajnandgaon, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh

--- Respondent

For Appellant	:	Shri Sudhir Kumar Bajpai, Advocate
For State/Respondent	:	Shri Sumit Jhanwar, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

30.1.2018

1. This appeal has been preferred against the judgment dated 16.5.2001 passed by the Sessions Judge, Rajnandgaon in Sessions Trial No.11 of 2001 convicting and sentencing the accused/Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 450 of the Indian Penal Code	Rigorous Imprisonment for 3 years
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 7 years

2. Case of the prosecution, in brief, is that on 8.12.2000 at about 7:00 p.m., the prosecutrix (PW1), a minor girl was alone at her house. She was cooking food. Her *Nani* (grandmother) Thaganbai (PW2) had gone out of home for attending the call of nature. She had closed the door of the house from outside. It is alleged that the Appellant, after opening the door, entered the house of the prosecutrix. He caused the prosecutrix to fall down and thereafter gagging her mouth, committed forcible sexual intercourse with her. Thaganbai returned home and shouted at the door. Then the prosecutrix opened the door from inside. Thaganbai, having seen

the Appellant, shouted "*Chor Chor*". The Appellant, pushing Thaganbai away, fled. On being searched, the Appellant was not found. The prosecutrix told about the incident to Thaganbai and other persons. Next day, i.e., on 9.12.2000, the prosecutrix lodged First Information Report (Ex.P1). She was medically examined by Dr. Jyoti Sadani (not examined by the prosecution) on 9.12.2000. Her report is Ex.P8. The Appellant was examined by Dr. N. Sachdeo (PW8). His report is Ex.P7 in which he found the Appellant to be capable of performing sexual intercourse. During investigation, birth certificate (Ex.P2C) of the prosecutrix was seized from Kotwar Dashrath (PW3) vide Ex.P3. 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 451 of the Indian Penal Code. Charges were framed against him under Sections 450 and 376 of the Indian Penal Code.

3. In support of its case, 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 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 from the evidence of the prosecutrix (PW1), it is clear that she was a consenting party. There is nothing on record to show that her age,

on the date of incident, was below 16 years. Since she was a consenting party and she herself had called the Appellant, no offence is made out against the Appellant.

6. Per contra, Learned Counsel appearing for the State supported the impugned judgment.
7. I have heard Learned Counsel appearing for the parties and perused the record minutely.
8. The prosecutrix (PW1) has stated before the Court that at the time of incident, she was cooking food at home. At about 7:00 p.m., her grandmother Thaganbai (PW2) had bolted the door of the house from outside and gone out for attending the call of nature. At that time, the Appellant entered her house and bolted the door from inside. She has further stated that he asked her what vegetable had she cooked. Thereafter, he gagged her mouth and caused her to fall down and then committed forcible sexual intercourse with her. Thereafter, he hid in the room. At that time, Thaganbai reached at the door of the house. She (the prosecutrix) opened the door from inside. Thaganbai entered the house. She saw the Appellant inside the room. She shouted "*Chor Chor*". On this, the Appellant ran out of the house. Many villagers reached there. They searched for the Appellant, but he was not found. Thaganbai told the villagers about the incident. Next day, the FIR (Ex.P1) was lodged by her (the prosecutrix). In paragraph 14 of her cross-examination, she has stated that when Thaganbai knocked the door from outside, she worn her clothes and thereafter she opened the door from inside. When Thaganbai asked her why did she close the door from inside, she told her that her Mama (uncle) had come. She has further stated that when the sound of knocking the

door from outside came, the Appellant ran away and she wore her underwear and then opened the door from inside.

9. Thaganbai (PW2) has stated that the prosecutrix (PW1) was living with her at her house. On the date of incident, she, after bolting the door of the house from outside, had gone out for attending the call of nature. On return, she found that the bolt of the door was open from outside, but the door was closed from inside. On being called, the prosecutrix, weeping, came and opened the door from inside and went towards the kitchen. She made a search in the house. She found the Appellant standing in a room. The Appellant, pushing her away, ran out of the house. She called villagers. Before the villagers, the prosecutrix told that the Appellant committed rape with her.
10. Pyari (PW4) has stated that when Thaganbai (PW2) shouted "*Chor Chor*", she came out in the lane. She did not see anybody. Thaganbai told her that the Appellant had entered her house for stealing.
11. Eknath (PW9), Mama (uncle) of the prosecutrix has stated that having heard the shouts, he went to the house of the prosecutrix. There he came to know that the Appellant had committed rape with her inside her house. The matter was reported next day. Patwari Ashok (PW7) prepared the spot-map (Ex.P6).
12. Dr. N. Sachdeo (PW8) examined the Appellant and gave his report (Ex.P7) in which he found the Appellant to be capable to perform sexual intercourse. He has further stated that the prosecutrix (PW1) was examined by Dr. (Smt.) Jyoti Sadani (not examined by the prosecution). Dr. N. Sachdeo (PW8) has proved the medical

examination report (Ex.P8) of the prosecutrix. As per Ex.P8, the prosecutrix was habitual to sexual intercourse. Town Inspector Rajesh Khare (PW11) is the witness who investigated the offence in question.

13. On minute examination of the evidence available on record, it is found that on the date and time of incident, the prosecutrix (PW1) was alone at home. Her grandmother Thaganbai (PW2), after bolting the door of the house from outside, had gone out for attending the call of nature. On return, she found that the bolt of the door was opened from outside and the door was closed from inside. On being knocked, the prosecutrix opened the door from inside. When Thaganbai entered the house, she found the Appellant standing inside the house and thereafter the Appellant pushing Thaganbai away ran out of the house. Though the prosecutrix has stated that the Appellant had committed rape with her inside the house yet she has categorically stated that after committing rape, the Appellant had hidden inside the room of the house. As per her statement, she opened the door of the house from inside after Thaganbai reached on the door. Thereafter, Thaganbai made a search inside the house. She reached where the Appellant had hidden. Thaganbai having seen the Appellant inside the house shouted "*Chor Chor*". The Appellant pushing her away, ran out of the house. Thereafter, the prosecutrix told Thaganbai about the incident. She has further admitted that when Thaganbai knocked the door from outside, she first worn her clothes and then opened the door from inside. On being asked by Thaganbai, she told that her Mama (uncle) had come. From the above, it is clear that the prosecutrix was a consenting party. The Appellant had entered her house with her consent and committed

the alleged sexual intercourse with her. If the sexual intercourse had been committed with her forcefully, the Appellant would not have hidden inside the room of the house after the incident. Rather, he would have run out of the house immediately after the incident. The above evidence shows that when Thaganbai suddenly reached at the door, the Appellant hid inside the room of the house. When Thaganbai saw the Appellant and shouted then the prosecutrix told Thaganbai about the incident. If the prosecutrix had not been a consenting party, she would have told about the incident to Thaganbai immediately on opening the door from inside. But, instead telling about the incident to Thaganbai, she told her that her Mama (uncle) had come. Thus, it is clear that the prosecutrix was a consenting party.

- 14.** Now, I shall examine the evidence available on record regarding the age of the prosecutrix.
- 15.** Except Kotwari Register (Ex.P2C), no other documentary evidence regarding age of the prosecutrix is available. The prosecutrix (PW1) has stated her age to be about 14 years. In paragraph 19, she admits that she does not know her date of birth. She also does not know where had she taken birth. She admits that her father lived in Village Dhara and her mother had died.
- 16.** Thaganbai (PW2), grandmother of the prosecutrix (PW1) has also stated that on the date of incident, the prosecutrix was aged about 14 years. She has also been unable to state about the date of birth of the prosecutrix. As per the statement of this witness, birth place of the prosecutrix was Village Katli where Thaganbai was residing.

17. Kotwar Dashrath (PW3) has stated that on 21.8.1986, on being told by Thaganbai (PW2), he had entered the date of birth of the prosecutrix as 20.8.1986. Kotwari Register is Ex.P2C.
18. A bare perusal of Ex.P2C reveals that name of Thanu Sahu is mentioned in the column of informant of the date of birth of the prosecutrix. Thanu Sahu has not been examined by the prosecution.
19. As per Court statement of Kotwar Dashrath (PW3), the entries were got registered by Thaganbai (PW2), but Thaganbai has not supported the above statement. As per Thaganbai, the birth place of the prosecutrix is Village Katli, but the prosecutrix (PW1) has stated that her father lived in Village Dhara and her mother had died. No conclusive evidence is available on record that how her birth took place in Village Katli, when her parents were residing in Village Dhara. The prosecution has also not submitted the Kotwari Register of Village Dhara. Even if for the sake of argument it is considered that the birth place of the prosecutrix was Village Katli and the informant of the entries regarding her birth was Thanu Sahu, he has not been examined by the prosecution. Kotwar Dashrath (PW3) has stated that the entries were got registered by Thaganbai, but this statement does not find support from the Kotwari Register (Ex.P2C). In **AIR 2010 SC 2933 (Madan Mohan Singh v. Rajni Kant)**, it was observed by the Supreme Court in paragraph 14 as under:

“14. there, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma v. State*

of Bihar, AIR 1970 SC 326; Ram Murti v. State of Haryana, AIR 1970 SC 1029; Dayaram & Ors. v. Dawalatshah & Anr., AIR 1971 SC 681; Harpal Singh & Anr. v. State of Himachal Pradesh, AIR 1981 SC 361; Ravinder Singh Gorkhi v. State of U.P. (2006) 5 SCC 584 : (AIR 2006 SC 2157 : 2006 AIR SCW 2648); Babloo Pasi v. State of Jharkhand & Anr. (2008) 13 SCC 133 : (AIR 2009 SC 314 : 2008 AIR SCW 7332); Desh Raj v. Bodh Raj, AIR 2008 SC 632; and Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh & Anr. (2009) 6 SCC 681 : (AIR 2009 SC 2805 : 2009 AIR SCW 4261). In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.”

20. In **AIR 2011 SC 715 (Alamelu v. State)**, in paragraph 39, the Supreme Court observed thus:

“39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi v. Anand Purohit*, 1988 (Supp) SCC 604, observed as follows:—

“The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined 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. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the

facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.”

The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta v. Birendra Kumar Jaiswal*, (2003) 8 SCC 745 where this Court observed as follows:—

“The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the “evidence of those persons who can vouchsafe for the truth of the facts in issue”.”

21. In the light of above discussion, it is established that on the date of incident, the age of the prosecutrix was not below 16 years. Since she was a consenting party and the Appellant had entered her house with her consent, no offence is made out against the Appellant.
22. 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.

- 23.** 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 Section 437A of the Code of Criminal Procedure.
- 24.** 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