

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1193 of 2002

Reserved on : 10/07/2018

Delivered on : 02/08/2018

- Shiv Kumar Sahu S/o Ramnath Sahu, aged 21 years, R/o Village Koterasarar, Police Station - Lalbagh, District Rajnandgaon (C.G.)

---- Appellant

Versus

- The State of Chhattisgarh

---- Respondent

For Appellant : Shri Arvind Dubey, Advocate

For Respondent/State : Ms. K. Tripti Rao, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

C.A.V. Judgment

1. This appeal arises out of the judgment of conviction and order of sentences dated 31.10.2002 passed by learned Sessions Judge, Rajnandgaon (C.G.) in Sessions Trial No. 146/2001, the appellant stands convicted and sentenced as under:-

<u>Conviction:</u>		<u>Sentences:</u>
Under Section 363 of the Indian Penal Code (hereinafter referred to as the 'IPC')		Rigorous imprisonment for five years
Under Section 366 of IPC		Rigorous imprisonment for seven years
Under Section 376(1) of IPC		Rigorous imprisonment for ten years
All the sentences to run concurrently		

2. As per prosecution case, on information received from PW-1 -Dhanaram, father of prosecutrix, a missing person report was recorded on 17.05.2001 in police station- Lalbagh in *Sahana* missing person No. 6/2001 and in reference to missing person report, inquiry was conducted by concerned police. Thereafter, a First

Information Report (Ex-P/22) was registered by Ms. Priti Bathri (PW-11), Investigating Officer, on 27.10.2001 at about 4:30 PM against accused/appellant under Section 363, 366 and 376 IPC. The case of the prosecution is that the prosecutrix (PW-2) was aged about 17 years on the date of incident. She is a married woman. Her marriage was solemnized on 02.05.2001 with Mahesh Sinha resident of Village- Mudhipaar. On 13.05.2001, the prosecutrix came back to her father's Village- Kotrasarar from Village- Mudhipaar. On 14.05.2001 at about 7:00 PM, the prosecutrix had gone for answer the call of nature and not returned to home. The prosecutrix was searched, but she was not found. On 27.05.2001, prosecutrix came back to Village Kotrasarar with the accused/appellant and the FIR (Ex-P/22) was lodged.

3. In the present case, it was revealed from 161 Cr.P.C. statement of the prosecutrix (PW-2) that as per pre-plan, accused/appellant and co-accused- Mahendra met with the prosecutrix. All of them had gone towards Bakal station by bicycle. Mahendra was cycling another bicycle. Shiv Kumar was cycling another bicycle, in which, the prosecutrix was sat on the carrier. Then they (accused and prosecutrix) left bicycle on Bakal station and by train they went to Dongargarh. They again changed the train and went from Dongargarh to Nagpur and from Nagpur, they had gone to Yawatmaal by bus. They reached Yawatmaal and stay approximate 8 days at the house of Ramesh Kumar Mandavi/co-accused. During this period accused-Shiv kumar without her consent forcefully made sexual intercourse against her and every day accused made sexual intercourse with the prosecutrix. After 8 days one village people Janak Sinha reached Yawatmaal, then the prosecutrix and Shiv Kumar came back village Kotrasarar. Prosecutrix stated in her statement that accused/appellant forcefully create love affair with the her. Both are giving letters to each other. After returned to Kotersarar, prosecutrix informed that the accused has given life threat to her and compel for sexual intercourse and accused made sexual intercourse with the prosecutrix.

4. Ex-P/1 is the seizure of school progress report; Ex.-P/2 is the seizure of 4th Class mark-sheet of the prosecutrix; Ex.-P/3 is the seizure of five love letters written by the accused/appellant to the prosecutrix; Ex.-P/6 is the spot-map prepared by Ms. Priti Bathri (PW-11), Investigating Officer; Ex.-P/8 is the seizure of *peticoat* of the prosecutrix; Ex.-P/9 is the seizure memo of underwear of the appellant/accused; Ex.-P/10 is seizure of vaginal slide and pubic hair of the prosecutrix; Ex.-P/11 is recovery *panchnama* of the prosecutrix from the house of PW-4- Pyari Singh, Kotwar; Ex.-P/13 is the seizure of *kotwari*- register; Ex.-P/14-C is the seizure of birth and death form of the prosecutrix; Ex.-P/16 is the spot-map prepared by Patwari- Murlidhar Sharma (PW-5); the prosecutrix was examined by Dr.(Smt.) Madhuri Khunte (PW-8), her report is Ex.-P/19; the accused was also examined by Dr. K.K. Tamrakar (PW-10), his report is Ex.-P/21 and Ex.-P/22 is the FIR.

5. After investigation, the charge-sheet was filed against the accused/appellant- Shiv Kumar and three other co-accused persons namely – Smt. Kumari Bai, Ramesh Mandavi, and Mahendra under Sections 363, 366, 368 and 376/34 IPC while framing the charges, the trial Judge framed the charge against the accused/appellant under 363, 366 and 376 (1) IPC.

6. The prosecution, in all, has examined as many as 11 witnesses. Statement of the accused was also recorded under Section 313 of the Criminal Code of Procedure, in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. There was no witness examined on behalf of the defence.

7. The trial Court after hearing counsel for the parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellant as mentioned in paragraph-1 of this judgment, hence this appeal. Other remaining co-accused persons are acquitted from the charges

levelled against them namely Smt. Kumari Bai and Ramesh Mandavi under Section 368 IPC and Mahendra under Sections 363/34 & 366 IPC..

8. Learned counsel for the appellant argued that the appellant has been falsely implicated in the offence. He submitted that prosecutrix-PW-2 admitted in her statement that she was gone to Dongarhgarh, Nagpur and Yawatmaal without any fear and the missing report was lodged by her father PW-1. He further submitted that the prosecutrix herself was left her father home due to she has not remained relation with her father and husband and the age of the prosecutrix was not proved. He also submitted that after the advised of Doctor, no ossification-test was conducted by the prosecution or any Doctor. He submitted that the accused has never kidnapped or abducting the prosecutrix and she had voluntarily gone with the accused to Yawatmaal and during stay at Yawatmaal and both have their sexual relation. The prosecutrix and the appellant in love affair from one year, therefore, the prosecutrix is a willing party and a consenting party. He submitted that the trial Court has mis-appreciated the entire evidence on record and the findings are bad in law and perverse, therefore, the judgment of conviction and sentences are liable to be set aside.

9. On the other hand, learned Panel Lawyer appearing on behalf of the State, argued that the age of the prosecutrix was accordingly proved by Ex.-P/13 *Kotwari*-register and she was below 18 years. She also argued that the conviction of the appellant is strictly in accordance with law and there is no illegality and infirmity in the judgment impugned warranting interference by this Court.

10. Heard learned counsel for the respective parties and perused the material available on record.

11. For proving the age of prosecutrix (PW-2), the prosecution has examined Dhanaram (PW-1), father of the prosecutrix and Pyari Singh (PW-4), Kotwar of the Village- Kotrasarar.

12. PW-1- Dhanaram is the father of the prosecutrix. He stated, in para-5 of his statement, that as per school progress report year 93-94 of Government Primary School, Kotrasarar in which the date of birth of the prosecutrix was mentioned as 07.10.1984 vide Ex.-P/1. In Para- 9 to 10, he admitted that he have a dairy in which he noted the birth of her daughter and also he admitted that he told the age of the prosecutrix on the basis of certificate. He further admitted that when the prosecutrix was admitted in the school, he filled a declaration-form in school and submitted the birth certificate of the prosecutrix. The father of the prosecutrix was the best person who was known about birth of the prosecutrix and the statement of PW-1 also supported by *Kotwari*-register.

13. PW-4 – Pyari Singh is Kotwar of Village-Kotrasarar. He has also proved *Kotwari*-register (Ex.-P/13) in which the date of birth of prosecutrix is 07.10.1984 and the birth entry was made on Ex.-P/14-C i.e. birth and death form seized by police officer. He also admitted in Para-9 that entry was not made by Kotwar but the *Kotwari*-register is public document maintained by Kotwar in due course of its official function.

14. Age of prosecutrix as per Ex.-P/2- school progress report, Ex.-P/3 mark-sheet of prosecutrix seized by In-charge Police officer but the author of that Ex.-P/2 document was not examined in the Court.. But, on the basis of *Kotwari*-register (Ex.-P/13) and school mark-sheet (Ex.-P/2), it is clear that the date of birth of the prosecutrix was 7th October, 1984 on the date of incident and there is no reason to disbelieve that these documents and that contents supported by PW-1 father of the prosecutrix. Finding given by the trial Court that the prosecutrix was below the age of 18 years and found the age of above 16 ½ years was absolutely correct.

15. For proving the conduct of the prosecutrix (PW-2), I shall examine the prosecution witnesses, including the prosecutrix.

16. PW-2- prosecutrix was a married women. She was married with one Mahesh Sinha and she was left her husband's house after 8 days of their marriage and as per prosecution case, she was in love affairs with accused/appellant. Prosecutrix herself admitted this fact in Para-10 of her statement that accused/appellant used to write love letters to her before marriage and she kept that letters in home. She further admitted that she was not known that above letters received from accused were seized by police in the possession of the accused and from 1 year, accused and prosecutrix were sending letters to each other. She also admitted in para-11 of her statement that these letters were sending through Janak -son of her sister-in-law (Bhabhi). She stated in para-9 of her statement that the letters received from accused/appellant seized by police is Ex.-P/3. In para-14 her statement, prosecutrix denied the fact of pre-plan that both (prosecutrix and accused) were met each other, but that statement was given to the police in her 161 Cr.P.C. statement (Ex.-D-2).

17. As per conduct of the prosecutrix, she admitted in Para-16 and 17 that she was sat on the carrier of the bicycle of Shiv Kumar, then they go to the Bakal Station and accused gone for purchasing ticket. Both of them boarded train from Bakal station to Dongargarh. Both are talking each other and reach Dongargarh. There was very crowd at Dongargarh railway station and police was also petrolling there but no complaint made to police or any public. From Dongargarh they went to Nagpur by another train. In compartment of train many people are there in train but she never complained any passenger. Thereafter from Napur to Yawatmaal they travelled by bus. She never complained to anybody in bus passenger that the accused was forcefully abducting her. Thereafter, they reached Yawatmaal. Every time accused and prosecutrix for going to answer the call of nature. In Yawatmaal they stayed at about 8 days and during this period both are living in same room. Accused also go for necessary works and other causes but the prosecutrix never complained anybody that the accused forcefully abducting her and causing any

threat to her and doing forcefully sexual intercourse with her. In para 25, the prosecutrix admitted that in Yawatmaal, the accused kept her in the house of Gajanand, where lot of house and so many people have lived in that area, but she did not tell to Ramesh Kumar and Kumari Bai that Shiv Kumar taken her on threat and kept there. She was married at the time of incident. Prior to marry, prosecutrix was in love with the accused.

18. As per Ex.-D-2 statement of the prosecutrix shown that she was a consenting party and gone with the accused. She willingly gone in bicycle with accused and Mahendra was in another bicycle. According to the prosecutrix statement, she was in love and affection with the accused. Prosecutrix and accused both were frequently sending letters to each other. Another conduct of the prosecutrix is that she was not willing to go her father's home. She returned from Yawatmaal to Kotersarar her father village.

19. PW-3 Itwari stated in para-3 of his statement that the prosecutrix and accused came back from Yawatmaal to Village- Kotrasarar and they stayed at night in the house of Pyari Singh (PW-4). He stated in para-9 that the husband of the prosecutrix has not reported the matter anybody for missing of wife PW-2. He also stated that the prosecutrix and accused were in love affairs from long time. He admitted in para-12 that the prosecutrix was not interested to go to her mother's-father's home and the prosecutrix wanted to reside with accused/appellant- Shiv Kumar.

20. PW-8 - Dr.(Smt.) Madhuri Khunte examined the prosecutrix and in her report Ex.-P/19, she opined that there is no evidence of forceful sexual intercourse and the prosecutrix is habitual for sexual intercourse. PW-10 – Dr. K.K. Tamrakar examined the accused/appellant and in his report (Ex.-P/21), he opined that the accused is capable to perform sexual intercourse.

21. In **Shyam and another Vs. State of Maharashtra, 1995 Cri.L.J. 3974**, the Hon'ble Supreme Court observed as follows:-

“In her statement in court, the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called “taking”, it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by “taking” her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touch 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused-Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam-the appellant on her own and in that sense there was no 'taking' out of the guardianship of her mother.”

22. In view of the above discussion and perused the material available on record, I am of the considered opinion that as per Ex.-P/1 – school progress report, Ex.-P/2- mark-sheet of Class 4th of the prosecutrix, Ex.-P/13 – Kotwari-register and Ex-14-C – birth and death form of the prosecutrix, it was proved that the date birth of the prosecutrix (PW-2) is of 07.10.1984, therefore, the prosecutrix was below the age of 18 years and above the age of 16 ½ years on the date of incident and she

was attained the age of maturity on the date of incident. And also looking to the entire conduct of the prosecutrix, it was also proved that as per pre-plan of the prosecutrix with appellant, she left her husband's house within 8 days of marriage and also left her parental house willingly and had gone with accused/appellant to Bakal railway station by bicycle of accused and from Bakal railway to Dongargarh; from Dongargarh to Nagpur by train and from Nagpur to Yawatmaal by bus. Every time she had an opportunity for help to disclose these facts that the accused was abducting her and committed forcible sexual intercourse upon her during her journey with accused and also stayed at Yawatmaal. The prosecutrix (PW-2) was in love affection with the accused from 1 year. It was also come in the evidence of prosecution witnesses that the prosecutrix was not interested to go her mother's-father's home and she wanted to live with the accused/appellant. As per Ex.-P/19 report of PW-8 - Dr.(Smt.) Madhuri Khunte, there is no evidence of forceful sexual intercourse and the prosecutrix is habitual for sexual intercourse. Therefore, entire conduct of the prosecutrix (PW-2) clearly shows that she was a willing party and a consenting party. She has attained the age of maturity. She was a fully grown up married woman and she was in the age of discretion, sensible and aware of the intention of the accused/appellant.

23. For the foregoing reasons and the principle laid down in *Shyam's* case (supra), the appeal is allowed. Conviction and sentences awarded by the learned trial Judge to the appellant under Sections 363, 366 and 376 (1) IPC are set aside and the appellant is acquitted of charges levelled against him. It is stated that the appellant is on bail since 23.04.2003, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437-A of Cr.P.C.

Sd/-

(Gautam Chourdiya)
Judge