

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 26-10-2018****Pronounced on 26-11-2018****Criminal Appeal No. 29 of 2002**

(Arising out of the judgment of conviction and order of sentence dated 26-12-2001 passed by the Additional Sessions Judge, Janjgir, Sessions Division Bilaspur (CG) in ST No. 169/1999)

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Keshar Kumar son of dhanaram Survanshi aged 20 years, R/o. Village Bhadara, PS Pamgarh, Distt. Janjgir Champa (CG)

Appellant

VERSUS

State of Chhattisgarh, through the SHO, Police Station Pamgarh, Distt. Janjgir-Champa (CG)

---- Respondent

For appellant : Shri Atul Pandey, Adv.

For State : Shri Ashok Swarnkar, Panel Lawyer.

Hon'ble Shri Sharad Kumar Gupta, Judge**C.A.V. JUDGMENT**

1. Challenge in this appeal is levied to the judgment of conviction and order of sentence dated 26-12-2001 passed by the Additional Sessions Judge, Janjgir, Sessions Division Bilaspur (CG) in ST No. 169/1999 whereby and whereunder he has convicted and sentenced the appellant as under :-

Sr. No.	Conviction u/S.	Sentence	Fine Sentence	In default of payment of fine
1.	363, Indian Penal Code (in brevity 'IPC')	5 years RI	Rs. 100/-	1 month SI
2.	366, IPC	5 years RI	Rs.100/-	1 month SI
3.	376(1), IPC	7 years RI	Rs.100/-	1 month SI

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

2. It is admitted by the appellant that prosecutrix was the resident of

village Bhadra, Kartikram is her father, Heerabai is her mother.

3. In brief, the prosecution story is that date of birth of the prosecutrix is 15-11-1984. On 08-01-1999 appellant had said her that tomorrow they will elope, if she will not elope then he will spoil her life. On the next date morning due to fear she left her parental house and reached in the house of appellant. Prosecutrix and he went to the house of Punnibai Suryavanshi at village Kotiya by bicycle. On 10-01-1999 they went to Naila by bicycle where he committed sexual intercourse with her. They again returned back to the house of Punnibai. Some people of her village reached there and told them to return back in village Bhadra, the matter will be compromised. They returned back at village Bhadra. On 15-01-1999 she lodged report in police station Pamgarh. After completion of the investigation, a charge sheet was filed against him. The trial Court framed the charges against him under Sections 363, 366, 376 of the IPC. To bring home the charges against him, the prosecution examined as many as 22 witnesses. The appellant abjured the guilt and faced trial. The appellant did not examine any witness in his defence. After conclusion of the trial, the trial Court convicted and sentenced him as mentioned above.

4. Being aggrieved by the aforesaid judgment of conviction and order of sentences, the appellant has preferred this criminal appeal.

5. Shri Atul Pandey, counsel for the appellant submits that allegedly prosecutrix was a consenting party, the appellant has been falsely implicated, Trial Court has not appreciated the evidence in proper perspective. Therefore, the impugned judgment of conviction and order of sentences being bad in law may be set aside and he may be acquitted of the aforesaid charges.

6. On the other hand, Shri Ashok Swarnkar, Panel Lawyer appearing for the State supported the impugned judgment and submitted that the trial Court has rightly convicted and sentenced the appellant. No interference is called for by this Court. Hence the appeal may be dismissed.

7. As per birth / death - birth report form Ex. P-4 (c) the date of the birth of the prosecutrix is 15-11-1984.

8. P.W. 6 Khikhram says in para 1 and 2 of his statement given on oath that he is Kotwar of village Bhadra since last 23-24 years. The father of the prosecutrix Kartik Suryawanshi had intimated him on 21-11-1984 that the date of the birth of the prosecutrix is 15-11-1984.

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 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.

10. There is no such evidence on record on strength of which it can be said that the aforesaid statement of P.W. 6 Khikhram, Ex.P-4(c), are not simple, not natural, not normal.

11. Looking to the above mentioned facts and circumstances, and aforesaid judicial precedent laid down by the Hon'ble Supreme Court in **Alamelu** (supra), this Court believes on Ex.P-4(c).

12. After the appreciation of the evidence discussed herebefore this Court finds that prosecution succeeded to prove beyond reasonable doubt that on 09-01-1999 prosecutrix was below 15 years of age.

13. P.W. 3 prosecutrix says in para 2, 3, 4, 5 and 6 of her statement given on oath that, appellant had told her that tomorrow she will elope otherwise he will spoil her life. He took her by bicycle to village Kotiya in house of Punribai. Thereafter he took her to Janjgir by bicycle. Thereafter he took her back in village Kotiya. Thereafter he brought back her in village Bhadra.

14. Soon after alleged threatening prosecutrix did not tell her parents about alleged threatening. This is not the prosecution case that at the time of alleged threatening appellant had shown any dangerous weapon to her.

15. Moreover, during going to one place to another prosecutrix did not tell to anyone that she has joined the company of appellant under compulsion on account of alleged fear. Prosecution failed to examine Punribai who may say that allegedly prosecutrix had told her about alleged threatening, for not doing so there is no explanation from prosecution.

16. As per the prosecution case, since back one year appellant used to say prosecutrix to marry her, when the people of village Bhadra had told them to return back then they had refused to return back in village Bhadra.

17. As per the prosecution case, prosecutrix had gone to the house

of the appellant.

18. In **S. Varadarajan -v- State of Madras** reported in 1965 (2) Cri.L.J. 33 it has been observed by Hon'ble Supreme Court in para-9 that :-

“9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

19. Looking to the above mentioned facts and circumstances of the case, aforesaid judicial precedent laid down by Hon'ble Supreme Court in **S. Varadarajan** (supra) this Court disbelieves the aforesaid statement of P.W. 3 prosecutrix, in the reference that appellant had allegedly taken or enticed her out of keeping of lawful guardianship of her without the consent of her guardian.

20. After the appreciation of the evidence discussed herebefore this Court finds that prosecution failed to prove beyond reasonable doubt the charges punishable u/s 363 and 366 IPC against the appellant. Thus, this Court finds that Trial Court has committed illegality in convicting and sentencing appellant of the charges punishable u/s 363

and 366 IPC. Thus, the conviction and sentences of the appellant for the offences punishable u/s 363 and 366 IPC are set aside.

21. As per MLC report Ex. P-11, P.W. 12 Dr. D.C. Choudhari had examined the appellant and found that his genital organs were well developed, he was competent to perform sexual intercourse.

22. There is no such evidence on record on the strength of which it can be said that Ex. P-11 is not believable. Thus this Court believes on Ex. P-11.

23. As per the MLC report Ex. P-12, P.W. 14 Dr. Lalita toppo (Minj) had examined prosecutrix and found that her hymen was old ruptured, she was habitual to sexual intercourse, no definite opinion about rape could be given.

24. There is no such evidence on record on the strength of which it can be said that Ex. P-12 is not believable. Thus this Court believes on Ex. P-12.

25. P.W. 3 Prosecutrix says in para 4 of her statement given on oath that appellant had committed sexual intercourse with her.

26. P.W. 1 Kartikram in para 5 and P.W. 2 Heerabai in para 6 say that prosecutrix had told them that appellant had committed sexual intercourse with her.

27. In the case in hand, FIR Ex. P-14 has been lodged on 15-1-1999. In Ex. P-14 it has been mentioned that appellant had committed intercourse with her.

28. In the matter of **State of H.P. -v- Shree Kant Shekari** [(2004) 8 SCC 153], Hon'ble Supreme Court has held in para 18 as under :-

“18. The unusual circumstances satisfactorily explained the delay

in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle. These aspects were highlighted in *Tulshidas Kanolkar v. State of Goa* [(2003) 8 SCC 590 : 2004 SCC (Cri) 44] .”

29. The relevant portion of para-13 in **Puran Chand -v- State of H.P.** [(2014) 5 SCC 689] wherein the Hon'ble Supreme Court has observed as under :-

“13.The delay in lodging the FIR has been clearly explained by the prosecution relating the circumstance and the witnesses supporting the same have stood the test of scrutiny of the cross-examination as a result of which the version of the victim girl cannot be doubted. The delay in lodging the FIR thus stands fully explained.”

30. In Ex. P-14 it has been mentioned that after returning back in her parental house prosecutrix proceeded to lodge the FIR. P.W. 3 Prosecutrix says in para 7 that after returning back in her parental house she had gone to police station to lodge the FIR.

31. There is no such evidence on record on the strength of which it

can be said that aforesaid explanation for lodging Ex. P-14 with delay is not sufficient or not natural. Thus, looking to the judicial precedents in the matters of **Shree Kant Shekari** (supra) and **Puran Chand** (supra), this Court finds that the delay in lodging Ex. P-14 is not fatal to the prosecution case regarding alleged commission of sexual intercourse by the appellant.

32. Looking to the above-mentioned facts and circumstances, this Court finds that Ex. P-14 is normal, natural, simple and is not concocted, not fabricated regarding alleged commission of sexual intercourse by the appellant.

33. Looking to the above-mentioned facts and circumstances of the case, this Court finds that the aforesaid statement of the prosecutrix is normal, natural, and simple and gets corroboration from the statements of para 5 of P.W. 1 Kartikram, para 6 of P.W. 2 Heerabai, Ex. P-10, Ex. P-12, Ex. P-14, thus, this Court believes on the aforesaid statement of para 4 of P.W. 3 prosecutrix.

34. As per the provisions of Section 375 – Fifth of the IPC, before the applicability of the Criminal Law (Amendment) Act, 2013 which came into force on 3rd day of February, 2013, a man is the guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 16 years of age.

35. In **Shree Kant Shekari** (supra), Hon'ble Supreme Court dealt with the sexual intercourse with minor girl, the relevant portion of para 14 is extracted herebelow :-

“14.Therefore, on the date of occurrence and even when the FIR was lodged on 20-11-1993 she was about 14 years of age. Therefore, the question of consent was really of no consequence”

36. This has been earlier decided that on 9-1-1999 prosecutrix was below 15 years of age, thus looking to the judicial precedent laid down by hon'ble Supreme Court in **Shree Kant Shekari** (supra), this Court finds that the question of consent of the prosecutrix does not arise in the case in hand.

37. Hon'ble Supreme Court in **Radhu Vs. State of M.P.** (2008)2, S.C.C. 207 laid down following judicial precedent :-

“A finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradictions. Absence of injuries on the private parts of the victim will not by itself falsified the case of rape, nor can be construed as evidence of consent nor the opinion of a doctor that there was no evidence of any sexual intercourse or rape, sufficient to disbelieve the victim. However courts should, at the same time, bear in mind that false charges of rape are not uncommon, and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.”

38. If for the sake of the argument, it is deemed that the aforesaid statement of para 4 of the prosecutrix does not get corroboration from other evidence, though this Court does not find so, then this has been earlier decided that aforesaid statement of para 4 of the prosecutrix is simple, natural and normal, thus looking to the judicial precedent laid down by the Hon'ble Supreme Court in **Radhu** (supra), this Court finds that the Court can act upon the aforesaid statement of the prosecutrix against the appellant.

39. After the appreciation of the evidence discussed hereinabove,

this Court finds that the prosecution has succeeded to prove the charge punishable under Sections 376(1), IPC against the appellant. Thus, trial Court has not committed any illegality in convicting the appellant under Section 376(1), IPC. Thus, this Court affirms the judgment of conviction passed by the trial Court under Section 376(1), IPC.

40. As regards sentence awarded to the appellant for offence punishable under Sections 376 of the IPC, it is just and sufficient and requires no interference. Thus, this Court affirms the sentence awarded by the trial Court to the appellant for the offence punishable under Section 376(1), IPC.

41. Consequently, the appeal is partly allowed. The fine amount if deposited by the appellant for the offences punishable under Section 363, 366, IPC, be refunded to him after expiration of the prescribed period for the legal action available to the parties.

42. The appellant is reported to be on bail. He is directed to surrender immediately before the trial Court for serving the remaining part of sentence under Section 376(1), of the IPC. If the appellant does not surrender, the Trial Court is directed to immediately take him into custody and send him jail to serve the remaining part of sentence.

**Sd/-
(Sharad Kumar Gupta)
Judge**