

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**Criminal Appeal No. 798 of 2003**

Raju Sarthi, S/o. Rajkumar, Aged about 20 years, Occupation- Mechanic, R/o. Bhilai-3, Dabrapara, District Durg, Chhattisgarh.

---- Appellant

Versus

State Of Chhattisgarh, Through District Magistrate, Durg, Chhattisgarh.

---- Respondent

For Appellant : Mr. K.K.Singh, Advocate

For State/Respondent : Mrs. Astha Shukla, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri**Order on Board****07.04.2018**

1. This appeal is against the judgment of conviction dated 22.02.2003 passed in Sessions Trial No.282/2001 by the Seventh Additional Sessions Judge (Fast Track Court) Durg, whereby the appellant has been convicted under Section 363, 366 & 376 of Indian Penal Code and sentenced to undergo R.I. for 3 years with fine of Rs.200/- under Section 363, R.I. for 3 years with fine of Rs.300/- under Section 366 and R.I. for 7 years with fine of Rs.500/- under Section 376, in default of payment of fine, further S.I. for 1 month in each Section was ordered.
2. As per the prosecution case, the complainant Roop Kumari, mother of the prosecutrix, was resident of Dabrapara and was a labour. She was living alongwith her son and daughter, the prosecutrix. The son was engaged as helper in the vehicle and the daughter used to stay in the house. The appellant Raju Sarthi was working as helper alongwith son of the complainant and used to frequently visit the house alongwith her son. On 04.05.2001, the appellant came to the house of the complainant and took her daughter away from the lawful guardianship of parents. The complainant searched at many places but she could not be found,

eventually a report was made by Ex.P-1. The mark sheet of the victim was seized wherein her date of birth was recorded as 13.10.1988 and Dakhil-khariz register was also seized by Ex.P-12. During the investigation, the victim was recovered from the house of the appellant from Chakarbhata by seizure memo Ex.P-10. Thereafter, the victim was subjected to medical examination and the report was given by Ex.P-8(A). The undergarment and other cloths were also seized by the police which the victim was wearing and the vaginal slides was also prepared of the victim which was Ex.P-11, which was sent for FSL Raipur. After recording the statement, the charge sheet was filed under Section 363, 366 & 376 of I.P.C.

3. During the course of trial, the appellant/accused abjured the guilt and claimed to be tried. The prosecution on their behalf had examined seven witnesses and the trial Court after evaluating the statement and evidence on record convicted the accused/appellant as aforesaid. Hence this appeal.
4. Learned counsel for the appellant would submit that the prosecution has failed to prove the age of the prosecutrix beyond the reasonable doubt. He submits that the document Ex.P-4 though has been exhibited but it has not been proved by the author of it. He further submits that the statement of the prosecutrix PW-3 would show that she was a major and she had herself went alongwith the victim of her own and traveled for a quite distance without any objection, which would lead to show that she was a consenting party. He further submits that the evidence of the Doctor would show that no definite opinion of rape was given. Under the circumstances, the conviction cannot be sustained and is liable to be set aside.
5. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellant and would submit that the judgment of

conviction passed by the learned Court below is well merited, which do not call for any interference.

6. I have heard learned counsel appearing for the parties and perused the records.
7. The prosecutrix in this case was examined as PW-3. She has deposed that on the date of incident, she went on the offer of the appellant from her house and initially they reached to Power House Railway Station and was carrying her cloths alongwith her and thereafter they boarded the Train and came to Bilaspur and thereafter they came to village Chakarbhata to his house. She further stated that when the father of the appellant asked her identity, the appellant said that she has eloped with him to perform marriage. She further stated that thereafter she was subjected to sexual intercourse without her consent and this is continued for three nights. In the cross examination, she stated for her taking her bath, she used to visit the pond of the village, however, did not complain anyone about alleged offence or asked any one to escort her back. The statement of the prosecutrix would show that she remained in the company of the appellant for 3-4 days in his house of her own consent and will.
8. The Doctor PW-5, Pratibha Dani, has stated that she had examined the victim aged about 13-14 years and the MLC report which was given was Ex.P-8 and according to her, no definite opinion was given about the recent sexual intercourse. Ex.P-8(A) would show that the victim was examined on 08.05.2001 i.e. immediately after her recovery as per Ex.P-10. In the statement of the prosecutrix, she deposed that she was subjected to sexual intercourse continuously for three nights but the same is not supported by the medical evidence when she was examined immediately after the recovery. The incident alleged to have been on 04.05.2001 in the night, therefore, the logical inference can be drawn on

08.05.2001 even if she was subjected to sexual intercourse according to her but the same is not corroborated by the Doctor by medical evidence.

9. Further, in the statement of PW-7, the I.O., he had stated that the seized materials were sent for FSL to Raipur by Ex.P-14. According to the seizure, the vaginal slides was seized by Ex.P-11. The undergarment of the appellant was seized by Ex.P-3 and undergarment of the victim was seized by Ex.P-2 and according to Ex.P-14 all the articles were sent for FSL. The FSL report in this case is not attached, therefore, what was the outcome of the FSL has become doubtful.
10. Now coming to the quantum of age, the prosecution has relied on the document Ex.P-4, the seizure of the mark sheet from the mother of the victim Roop Kumari who is examined as PW-1. As per her statement, the mark sheet of the victim was seized by Ex.P-4(A). The mark sheet Ex. P-4(A) would show the date of birth of the victim as 13.08.1988. One document Ex.P-12 which is also a seizure memo made from Amar Singh Thakur, the Headmaster of the School which shows that the Dhakhil-Khariz register was seized from the school wherein the date of birth of the victim was shown as 13.10.1988 but the copy of the register has not been produced in the record by the prosecution.
11. As has been held in case of **Umesh Chandra v. State of Rajasthan** reported in **AIR 1982 SC 1057** and in the matter of **Raunki Saroop v. State, AIR 1970 Punjab & Haryana**, that the entries in the school register are not of much value unless there is evidence to show that on what material and at whose instance, it is based. Further, as has been held in case of **Birad Mal Singhvi v. Anand Purohit** reported in **AIR 1988 SC 1796** the Supreme Court in para 24 has held as under :

“24.....The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry

contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date or birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value."

12. The statement of PW-1, Roop Kumari, mother of the victim, would show that he has not categorically stated the date of birth on what basis it was recorded but she only stated that the age of the victim was 13 years 4 months. The Doctor PW-5, Pratibha Dani, in the MLC on the primary inspection has stated the age of the victim is 13-14 years and Ex.P-8(A) medical report, the advice was given and reference was made for age confirmation to the Radiologist in the District Hospital Durg.
13. Perusal of the record of the entire case would show that one Radiologist report is enclosed in this case i.e. of District Hospital Durg wherein according to the Doctor the age of the victim is shown as 16 years. Therefore, at this stage, while evaluating the judgment and conviction, this Court cannot ignore such document on record which is specifically produced by the prosecution itself wherein the age of the victim is shown to be 16 years. The incident was of 2001, as such, at the relevant time, as per Section 375 of I.P.C. to construe the offence of rape, the outer limit of age of the victim was presumed as 16 years. Therefore, reading the statement and the document conjointly, the document which was produced by the prosecution in the Court below wherein the Doctor has opined the age of the victim was 16 years on the date, I am of the opinion that the benefit of doubt should lean in favour of the appellant/ accused to hold the fact that on the date of incident, the age of the victim was 16 years. Further perusal of the statement of the victim would show that she

herself had gone alongwith the accused/appellant and remained in the company of the appellant for a considerable period and when traveled from place to place she did not object to it. If such statements are read in parallel alongwith the documents on record, in the statement of the Doctor and the Radiological report, it would point out that she was a consenting party in the company of the appellant. Therefore, evaluating the entire evidence, I am of the opinion that the prosecution has failed to prove the fact that on the date of incident, the victim was minor and was taken away from the lawful custody of their parents without their consent. Consequently, the prosecution has further failed to prove the fact that she was subjected to forceful sexual intercourse by the appellant against her will.

14. In a result, the appeal succeeds and is allowed. The judgment of conviction and order of sentence dated 22.02.2003 passed by the learned Court below is set aside. The appellant is acquitted of the charges. It appears that the accused/appellant is on bail, his bail bond shall continue for a period of six months, in view of the provisions contained in Section 437-A Cr.P.C.

Sd/-
(Goutam Bhaduri)
JUDGE