

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 116 of 2010**

- State of Chhattigarh through District Magistrate, District Korea, Chhattisgarh.

---- Appellant.

Versus

- Arun Vishwakarma @ Babbal s/o. Shri Budheswar aged about 21 years, r/o. Billora, Police Station, Patna, District Korea (CG).

---- Respondent

For Appellant/State : Mr.Rajendra Tripathi, Panel Lawyer
For respondent : None

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Hon'ble Shri Prashant Kumar Mishra,
Hon'ble Shri Ram Prasanna Sharma, JJ

Oral Judgment**Per Ram Prasanna Sharma, J****(12-2-2018)**

1. This acquittal appeal is preferred against the judgment dated 11-11-2008 passed by the Sessions Judge/Special Judge (under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989) (for short, "the Act, 1989"), Baikunhtpur, Sessions Division Korea (CG) in Special Case No. 01/2008 wherein the said Court acquitted the respondent from the charges of commission of offence under Sections 363, 366, 376(1) of IPC and Section 3 (2) (v) of the Act, 1989 for kidnapping and committing rape on prosecutrix.

2. As per prosecution case, prosecutrix is a minor and respondent who is neighbour of the prosecutrix enticed her to elope with him at Baikunthpur Bus-Station with a promise that he will marry her and during that period he had done forceful sexual intercourse with her between 23-7-2007 to 31-7-2007. The matter was reported to Police Station Baikunthpur and after registration of first information report, police authorities investigated the matter. After completion of investigation, charge-sheet was filed against the respondent to which he did not plead guilty, therefore, trial was conducted. After examination of prosecution witnesses, statement of respondent under Section 313 of Cr.P.C., was recorded and after hearing both the parties the trial Court acquitted the respondent as mentioned above.

3. Learned State counsel submits as under:

- i) The trial Court failed to appreciate the evidence of school register and other material regarding minority of the prosecutrix and came to a wrong conclusion.
- ii) The trial Court is not justified in discarding the evidence of prosecutrix and her parents and failed to appreciate the other evidence in its right perspective and there is no reason to disbelieve the witnesses adduced before it.
- iii) The trial Court is not justified in overlooking the opinion given by the medical expert and again in overlooking the corroborative piece of evidence regarding seizure of undergarment and report regarding presence of semen.

4. We have heard learned counsel for the appellant/State and perused the record.

5. The respondent was charged for commission of offence under Sections 363, 366 and 376(1) of IPC. For commission of offence under Section 363 of IPC, it has to be established that minor was taken or enticed out of lawful guardianship of her parents. As per Indian Majority Act, 1875 and as per Section 361 of the IPC, female under 18 years of age is minor.
6. Now the first point for consideration is whether the prosecutrix was minor on the date of offence which is 23-7-2007 as per prosecution case. No birth certificate of prosecutrix was produced before the trial Court to establish her date of birth.
7. PW/25 Ashok Kumar Choubey is a Teacher of Primary School, Bilari and he produced one register of admission before the trial Court, he admitted that no birth certificate was produced before him while recording date of birth of the prosecutrix which is mentioned as 15-12-1993. He further deposed that date of birth of the prosecutrix is recorded as per imagination of parents of the prosecutrix. From his statement, it is clear that date of birth of the prosecutrix was not recorded on the basis of birth certificate but it was recorded on the basis of imagination and the same is not exact date of birth of the prosecutrix.
8. PW/8 Smt. Shringaro Bai and PW/9 Jokhan Singh are parents of the prosecutrix. Both have not stated in their statements about the date of birth of the prosecutrix. They have not mentioned the date of birth of any of their children. On the basis of their oral statements also date of birth of the prosecutrix is not established.

9. PW/28 Dr. Ashish Karan is Senior Medical Officer and as per version of this witness he took x-ray of the prosecutrix and on the basis of x-ray he opined that the age of prosecutrix is more than 16 years but less than 17 years. In his cross examination he admitted that there occurs variation of 2-3 years on the age calculated as such on either side.
10. Looking to the evidence of this witness, age of the prosecutrix comes out to be between 16 to 20 years. A female is minor when she is below age of 18 years but from the evidence of this medical expert, she may be aged about 20 years. Looking to the evidence adduced by the prosecution it is not proved that prosecutrix was below 18 years of age on the date of incident i.e., 23-7-2007. If a female is more than 18 years, she is not within lawful guardianship of her parents and for such female Section 363 of IPC is not attracted.
11. Next point for consideration is whether prosecutrix has been kidnapped with intent to compel her to marry or that she may be forced to have sexual intercourse and whether the respondent committed sexual intercourse with her without her consent and against her will.
12. Offence of sexual assault is committed in place of secrecy and for establishing such offence evidence of prosecutrix is of paramount consideration. Prosecutrix is witness No.1 before the trial Court. As per her version, respondent had taken her to village Banjaridand on 23-7-2007 and then shifted her to some other place and thereafter shifted to Srinagar, Kuthanpara and Kathora. From her statement, it is established that she visited different places with respondent where

respondent committed sexual intercourse with her. As per version of this witness, respondent had taken her on a motor-cycle from Bus Station Baikunthpur, but in her statement before the Investigating Officer under Section 161 of Cr.P.C., as per Ex.D/1, she narrated that respondent had taken her in a bus upto village Banjaridand

13. PW/4 Ku. Sunaina accompanied the prosecutrix while both were coming in a bus on the date of incident and both alighted at Bus-stand Baikunthpur. She deposed that respondent asked prosecutrix to accompany her and thereafter she gave her bag to this witness and thereafter this witness left the place. PW/8 Smt. Shringaro Bai, who is mother of the prosecutrix has deposed in para 3 of her cross examination that she was in search of her daughter and while she was going towards village Banjaridand her daughter /prosecutrix was coming with respondent and both met her where respondent said her that she should not tell about the incident and thereafter her daughter and respondent proceeded ahead. When prosecutrix left her mother maintaining her company with respondent, her conduct shows that she was a consenting party with the respondent.
14. From the entire evidence, it is established that prosecutrix visited different places in the company of the respondent and even she bypassed her mother maintaining her company with the respondent. Again she has not made any complaint during her visit to different places which shows that the relation between prosecution and respondent was consensual. It is not a case where offence is committed on the basis of caste. It is relation between male and female. There is no perversity in the finding recorded by the trial

Court and the same is based on relevant material placed before it and the same is not based on irrelevant or extraneous matter. We are of the view that the finding of the trial Court is not liable to be disturbed or modified.

15. Accordingly, the appeal is liable to be and is hereby dismissed.

Sd/-

**Judge
(Prashant Kumar Mishra)**

Sd/-

**Judge
(Ram Prasanna Sharma)**

Raju