

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.246 of 2010**

Rakesh Kumar Yadav, aged about 20 years, S/o. Beni Prasad Yadav, R/o. Village Rajiv Nagar, Khursipar, PS Khuripar, District Durg (CG)

---- Appellant**Versus**

State Of Chhattisgarh, Through Police Station Khursipar, Distt. Durg (CG)

---- Respondent

 For the appellant : Shri Ravi Bhagat, Advocate on behalf
 of Shri Raj Kumar Gupta, Advocate
 For the respondent/State: Shri Lav Sharma, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****16.11.2018.**

1. This appeal is directed against the judgment dated 05.02.2010 passed by XI Additional Sessions Judge (FTC), Durg Distt. Durg (CG) in Session Trial No.08/2009 wherein the said Court convicted the appellant for commission of offence under Sections 363, 366 & 376(three counts) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for three years and to pay fine of 1000/-; RI for three years and to pay fine of R.1000/-; RI for seven years and to pay fine of Rs.5000/- with default stipulations.

2. In the present case, prosecutrix is PW-1. As per the prosecution case, the appellant kidnapped the prosecutrix on 19.11.2008 from lawful guardianship and she was subjected to

forceful intercourse by the appellant from 19.11.2008 to 13.12.2008.

3. Learned counsel for the appellant submits that ossification test is not a reliable piece of evidence and the age of the prosecutrix cannot be ascertained on the basis of ossification test. He further deposed that statement of the father of the prosecutrix namely Alok Chandra Sahu (PW-3) is not conclusive in nature regarding the age of the prosecutrix, therefore, it is not proved that the prosecutrix was minor on the date of incident. He further submits that the evidence of the prosecutrix is not of sterling quality therefore, it cannot be acted upon. The trial Court has overlooked the material contradictions and omissions in the statement of the prosecution witnesses, therefore, finding arrived at by the trial Court is liable to be reversed.

4. On the other hand, learned counsel for the State while opposing the arguments submits that the findings arrived at by the trial Court is based on proper marshaling of evidence and the same is not liable to be interfered with invoking the jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record.

6. Now the first question for consideration before this Court is whether the prosecutrix was minor on the date of incident i.e. on 19.11.2008. Alok Chandra Sahu (PW-3) is the father of the prosecutrix. As per the version of this witness (para 9), he had maintained diary in which he has written the dates of birth of his

children. He further deposed that he recorded the date of birth on the basis of the diary maintained by him. Lijo Mathew (PW-4), the Principal of Nirmala Rani Vidyalaya, Khurispur, deposed that date of birth of the prosecutrix is recorded in the school register as 17.02.1995. Version of this witness is supported by the version of father of the prosecutrix and looking to the statement of both these witnesses, it is established that the date of birth of the prosecutrix is 17.02.1995 and she was aged about 13 years and 9 months on the date of incident. Date of birth of the prosecutrix is again corroborated by the version of Dr. AK Sahu (PW-7), who is the Radiologist and after ossification test he opined that age of the prosecutrix is about 15-16 years. Looking to the record of the school it is established that the prosecutrix was aged less than 14 years and therefore, she was minor on the date of incident.

7. Prosecutrix (PW-1) deposed that the appellant took her to the house of his friend and kept her for 20-25 days. From the statement of the prosecutrix it is established that the appellant committed rape on her. Version of this witness is subjected to searching cross-examination but nothing could be elicited in favour of the defence.

8. As the prosecutrix was minor on the date of incident, she was not competent to give consent, therefore, act of the appellant falls within mischief of rape which is punishable under Section 376(1) of the IPC. Again from the statement of the prosecutrix and her father, it is established that she had been taken or enticed without consent of the parents and therefore, it is a case of

enticing a minor girl without consent of the parents which falls within mischief under Section 361 of the IPC and punishable under Section 363 IPC. From the evidence it is clear that the appellant kidnapped the minor prosecutrix with intend that she will be forced to illicit intercourse. Again this act of the appellant falls within mischief punishable under Section 366 of IPC. Looking to the entire evidence on record, the trial Court has convicted the appellant for commission of offence under Section 363, 366 and 376 of the IPC. This Court has no reason to record a contrary finding because the same is based on relevant facts and it is not based on irrelevant and extraneous facts. Therefore, conviction of the appellant is hereby affirmed.

9. The trial Court has awarded minimum sentence for commission of offence under Section 376(1) IPC and less than minimum cannot be awarded. Therefore, sentence part cannot be interfered with. As per the report, the appellant has been released from jail after serving the full jail sentence awarded to him and after remission granted to him by the jail authorities. In view of this no further order is required for his arrest.

**Sd/-
(Ram Prasanna Sharma)
JUDGE**