

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 815 of 2015**

Jitendra Harijan S/o Shiv Lochan, aged about 25 years R/o Village-Ameenwal, Thana Mada, Distt. Singrauli (M.P.).

---- Appellant

Versus

State of Chhattisgarh, Through the Police Station: Raghunath Nagar, Distt. Surguja (C.G.) Civil Distt. Surguja & Revenue District Balrampur-Ramanujganj (C.G.)

---- Respondent

For Appellant	:	None.
For State	:	Mr. Vinod Kumar Tekam, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma

Judgment On Board

18/08/2018

1. This appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment dated 04.06.2015 passed by Additional Sessions Judge, Ramanujganj, District-Balrampur-Ramanujganj (C.G.) in Sessions Trial No. 379/2012, wherein the said court convicted the appellant for commission of offence under Sections 363, 366, 376 & 506-B of IPC and sentenced to R.I. for 5 years and fine of Rs. 500/-, R.I. for 7 years and fine of Rs. 500/-, R.I. for 8 years and fine of Rs. 500/- and R.I. for 3 years and fine of Rs. 500/- respectively with further default stipulations.
2. In the present case, the appellant charge-sheeted on the ground that he kidnapped minor prosecutrix from lawful guardianship on 14.08.2012 at about 3.00 p.m. from village-Kamardih with intent that she may be compelled to illicit intercourse, committed rape on her and threatened her to kill. To substantiate the charge, the prosecution examined as many as 12 witnesses.

3. Vijay Lal (PW-5) is father of the prosecutrix, but he did not depose the date of birth of the prosecutrix. He did not depose as to when the prosecutrix admitted in the school and by whom she had brought to school for admission. Though, he deposed that age of the prosecutrix was 16 years upon a leading question put by the prosecution side, but the fact remains that he did not depose date of birth of the prosecutrix.
4. Smt. Ful Kumari (PW-7) is mother of the prosecutrix, though she deposed that age of the prosecutrix is 15 years, but she did not depose date of birth of the prosecutrix. No birth certificate was produced before the trial court to establish exact date of birth of the prosecutrix. Date of offence is 14.08.2012, the prosecution is under obligation to prove that on the date of incident, the prosecutrix was below 18 years.
5. R.K. Singh (PW-9) who is Principal of Government High School, Janakpur deposed that date of birth of the prosecutrix is recorded in the register as 02.04.1996, but he further deposed that date of birth is recorded on the basis of transfer certificate of Class-VIII.
6. From statement of this witness, it is clear that the date of birth is not recorded on the basis of birth certificate. No evidence of village Kotwar is adduced before the trial court to establish exact date of birth of the prosecutrix. Unless age of the prosecutrix is proved to be less than 18 years on the date of incident, offence of kidnapping cannot be established. It is settled law that for establishing a criminal case, extract proof is to be submitted before the court but in the present case, the exact date of birth is not proved on the basis of birth certificate or school register. It is also not proved as to

who admitted the prosecutrix in primary school and how her date of birth is recorded in the said school.

7. In absence of birth certificate and primary school certificate, it is not established that prosecutrix was below 18 years on the date of incident. Once it is not proved that she was minor on the date of incidence, the offence under Section 363 is not established.
8. Prosecutrix (PW-2) deposed that the appellant committed rape on her but at the same time, she deposed that she did not try for help from anyone. Again she deposed that she visited village- Baidhan with the appellant and traveled with him in bus and stayed therein for 7 days, where also the appellant committed rape on her.
9. Looking to the statement of the prosecutrix, it is established that she accompanied the appellant traveled with him and stayed with him for 7 days which shows that she willingly accompanied with the appellant for 7 days and therefore, possibility of consent for making physical relation cannot be ruled out.
10. Again, conduct of the prosecutrix not informing anyone whether they are neighbor or family members regarding the incident shows that nothing is committed against her without her consent or against her will.
11. From her statement it is clear that the appellant made physical relation with the prosecutrix several times in different places like village- Bhaidan, in house of her sister and house of the appellant and from her statement it is clear that she never complained anyone for these incident.
12. Looking entire evidence of the prosecutrix, it cannot be held that the appellant made physical relation against will or consent of the

prosecutrix, offence under Section 366 & 376 of IPC is not established.

13. The prosecutrix did not narrate regarding threat by the appellant in her examination in chief and she deposed the same for the first time when leading question was put to her by the prosecution side. From her statement, it is not clear that the appellant was determined to execute the threat given by him. Unless, the person is able to execute his threatening on the spot, the words stated by him is mere fury in which there is sound, but there is no substance. The prosecutrix has not deposed in her examination in chief for threatening her by the appellant, threat to kill is not established by statement of the prosecutrix herself, offence under Section 506-B of IPC is not established.
14. For the foregoing reasons, the appeal is allowed. The judgment of conviction and order of sentence passed by the trial court is set aside. The appellant is acquitted of the charges under Sections 363, 366, 376 & 506-B of IPC. He be set at liberty forthwith if not required in any other case. The fine amount, if paid, shall be refunded to the appellant.

Sd/-
(Ram Prasanna Sharma)
Judge