

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 151 of 2010****Judgment reserved on 11-1-2018****Judgment delivered on 29-1-2018**

- State of Chhattisgarh through District Magistrate, Durg (CG).

---- Appellant**Versus**

- Narayan Rao Telgu S/o Narsaiya Telgu R/o High School Sector, Ward No.9, Dallirjhara, Ps Rajhara, Durg

---- Respondent

For Appellant/State	Mr. R.K. Mishra, Dy. Advocate General
For respondent	Mr. Rishi Shau, Advocate.

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

CAV Judgment**Per Ram Prasaanna Sharma, J**

1. This acquittal appeal is directed against the judgment dated 31-1-2008 rendered by the Additional Sessions Judge, Balod, (for short, "the trial Court") Sessions Division Durg (CG) in Session Trial No. 17 of 2007 wherein the trial Court acquitted the respondent for commission of offence punishable under Section 417, 376(1), 363 and 366 of the IPC.
2. As per prosecution case, prosecutrix and respondent were

neighbours and on the pretext of marriage respondent committed sexual intercourse with her and they visited Durg from Dallirajhara, but ultimately respondent denied to marry her. The matter was reported to Police Station Durg after one year of the date of incident. After registration of first information report, Police swung into action and started investigation. After getting certificate of date of birth of prosecutrix and examining both parties medically, the statements of the witnesses were recorded. After completion of investigation, charge sheet was filed against the respondent. The respondent pleaded innocence and thereafter the trial was conducted. After examination of the witnesses, statement of the respondent was recorded under Section 313 of the Code. After hearing the parties, the trial Court acquitted the respondent as aforementioned.

3. Learned counsel for the State submits as under:

- (i) As per school certificate age of the prosecutrix comes out to be less than 18 years and she was minor, therefore, prosecution has established its case against the respondent.
- (ii) When the respondent made promise to marry the prosecutrix, consent was obtained by misrepresentation of fact under Section 90 of IPC, therefore, it is not a case of consent.
- (iii) The trial Court was not justified in giving too much weightage to the minor omissions and contradictions appeared in the prosecution evidence.

4. On the other hand, learned counsel for the respondent submits that the finding arrived at by the trial Court is strictly in accordance with law based on legally admissible evidence and same is not liable to be interfered with invoking jurisdiction of the appeal.
5. We have heard learned counsel for both parties and perused the record of the trial Court.
6. Dr. Vinita Ravte (PW/14) examined prosecutrix on 11-6-2007 at Community Health Centre, Dondilohra, District Durg and after her examination she opined that prosecutrix was habitual to sexual intercourse. In first information report lodged by the prosecutrix her age is mentioned to be 17 years.
7. As per version of Dr. A.K. Sahu, Radiologist (PW/8) age of the prosecutrix is between 17 to 18 years. It is settled principles of law that age determined by the Radiologist examination there may be two years variation on either side. It means, the age of the prosecutrix is between 16 to 20 years. Though P.S. Dudhe (PW/3) deposed that date of birth of prosecutrix recorded in the school register is 5-7-1990 but he deposed that same is not recorded by him and it is not known to him as to when the entry is made and by whom it is made. Looking to the version of this witness, date of birth of prosecutrix recorded in the school register is not proved. The evidence adduced by the prosecution through Radiologist determines the age of the prosecutrix upto 20 years. Looking to the evidence it cannot be said that prosecutrix was having age less than 18 years on the date of incident and, therefore, it is not safe for us to

conclude that prosecutrix was minor at the time of commission of the alleged offence.

8. PW/12 prosecutrix deposed that on the pretext of marriage she made physical relation with respondent. Though she stated that she conceived from the respondent and she was carrying pregnancy of three months, but no such medical report is submitted in support of the said statement. No medical expert is examined in this regard and it is not established by way of medical evidence that prosecutrix was carrying pregnancy. It is deposed by the prosecutrix that she visited Durg with respondent and stayed with him and the matter was reported only when the respondent denied to marry her or failed to keep the promise. On the statement of prosecutrix, it is established that they have made long and continued relation before the matter was reported to Police Station. As it is not proved that prosecutrix was minor on the date of incident which is said to be 9-6-2007, therefore, it is difficult for us to conclude that it is a case of kidnapping the minor girl from lawful guardianship from her parents.
9. Now the point for consideration is whether any promise was made to the prosecutrix and whether consent was given by her in consequence of misconception of fact. From the statement of prosecutrix, it is not clear that when they have made physical relation for the first time, the respondent has made any promise to marry her. As per version of the prosecutrix after first physical relation, the respondent made promise to marry her. From the statement of prosecutrix, it is not clear that as per promise of the

respondent what was the probable date for marriage. From her statement, it is clear that the report is lodged after one year of the first physical relation. The prosecutrix first consents to an act of sexual intercourse not on promise of marriage and then made to indulge in such activity is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 of the IPC cannot be called in aid in the circumstances of the present case, because first relation was made without such promise and there is nothing on record to assure that from very inception the respondent never really intended to marry her. Failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to misconception of fact right from the inception.

10. Prosecutrix deposed that she was carrying pregnancy, but no such medical evidence was adduced by the prosecution and one Doctor who was called before the trial Court to corroborate the same has been given up by the prosecution without examination, therefore, it is not proved that she was pregnant. The statement made by the prosecutrix regarding pregnancy is not proved and that makes her statement unworthy of credence.
11. In the surrounding circumstances of the case, it would not be safe for us to conclude that it is not a consensual sex. When prosecutrix is not minor she is legally competent for consensual sex and same is not an offence under Sections 376(i) or 366 of the IPC. The respondent was charged with Section 417 of IPC also. Section 417

of IPC prescribes punishment for the offence of Cheating as defined under Section 415 of IPC. Section 415 of IPC reads thus:

“415. Cheating – Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally includes the person so deceived to do or omit to do anything which he would not do or so omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'. Explanation- A dishonest concealment of facts is a deception within the meaning of this section”.

12. A careful reading of evidence on record clearly shows that there is no evidence against the respondent from which it can be conclusively inferred by this court that there was any fraudulent or dishonest inducement of the prosecutrix by the respondent to constitute an offence under Section 415 of IPC as the act appears to be consensual. For conviction of the respondent for above said offence, it is important that all the necessary ingredients constituting an offence under the said Section must be proved beyond reasonable doubt.
13. In view of the above, the finding recorded by the trial Court is based on legally admissible evidence though it can be re-appreciated, but looking to the facts and surrounding circumstances of the case, the same is not liable to be interfered with invoking jurisdiction of the appeal.

14. Accordingly, the appeal fails and is hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Ram Prasanna Sharma)

Raju