

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 3010 of 1998**

- Narayandas S/o Purushottam Manikpuri, Aged About 22 Years, R/o Village – Khapri, P.S. Sahela, Distt. Raipur (M.P.)

----Appellant**Versus**

- State of M.P. (Now C.G.) through Arakshi Kendra, Palari, Distt. Raipur (M.P.) (Now C.G.)

---- Respondent

For Appellant	:	Shri Vipin Tiwari, Advocate
For Respondent/State	:	Shri Luv Sharma, PL for the State

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****21/07/2018**

1. This is an appeal against the judgment dated 09.09.1998 passed by the First A.S.J., Baloda Bazar, Distt. Raipur in S.T. No.232/96 whereby the appellant has been convicted under Sections 363, 366 & 376 (1) IPC and has been sentenced for 3 years RI under Section 363 IPC and a fine of Rs.1000/- and in absence of payment of fine, additional 6 months RI was ordered for and has further been sentenced to 3 years R.I. under Section 366 IPC and fine of Rs.1000/- and in absence of payment of fine, additional 6 months RI was ordered for and lastly the appellant has been sentenced to 7 years R.I. under Section 376 (1) IPC and fine of Rs.5000/- and in absence of payment of fine, additional 1 year R.I. was ordered for.
2. As per the prosecution case, one Balwan Singh Sahu was residing in village Khapri, his daughter PW-4 was a minor aged about 13-14 years residing

with him. All of a sudden she was found missing since 09.12.1995. Having searched in the house of the relatives and in the nearby villages, she was not found. Lately on 27.12.1995 she was spotted in the house of one Purushottam in the village. Having enquired, it revealed that the present appellant was instrumental to entice away the minor girl from the lawful custody of her parents. Thereafter, the father of the prosecutrix called for the villagers and when they asked to return the girl, it was replied that after 2 – 3 days they will reply properly, but eventually did not reply. In a result, at last a report was made vide Ex. P-3. The police after registration of the FIR investigated the matter and it was found that the present appellant has allured and enticed away the minor girl and committed forceful sexual intercourse. The police recorded the statement of the doctor as also the prosecutrix and having come to the finding that the sexual intercourse with a girl was committed by the appellant, the charge-sheet under Sections 363, 366 & 376 IPC was filed.

3. During the course of trial, the appellant abjured the guilt and claimed to be tried. On behalf of the prosecution 15 witnesses were examined and the Court after evaluating the facts and evidence convicted the accused as aforesaid. Hence this appeal.
4. Learned counsel for the appellant submits that the father of the prosecutrix Balwan (PW-3) has admitted the fact that when the girl/prosecutrix, who was in the company of the appellant and after the appellant refused to return the girl, the FIR was lodged, therefore, no offence against the appellant is made out. He further submits that on the date of incident, the prosecutrix was major as there is variance of three years has to be added to the age as the age 16 years has been shown by the medical report, therefore, the appellant is required to be acquitted of the charges leveled against him.

5. Per contra, learned State counsel opposes the arguments advanced by learned counsel for the appellant and submits that the order passed by the Court below is well merited which do not call for any interference.
6. The prosecution in this case, in order to prove the age of the prosecutrix has relied on the statement of the father of the prosecutrix Balwan (PW-3), wherein he has stated that the age of the prosecutrix was 14-15 years at the time of incident. The school certificate as per the witness Balwan (PW-3) was seized by Ex. P-7 from the father. The school certificate in this case is marked as Article A, wherein date of birth is shown as 01.07.1982. As against this the father Balwan (PW-3) had stated that his first son was borned on 23- 24 years back, thereafter, one more child was borned after two years and thereafter, after two years, the prosecutrix was borned. Therefore, as per the statement of Balwan (PW-3) at para 4, the presumptive age of the prosecutrix comes to 20-21 years. Though the school certificate has been marked as Article A, but no witness has proved it, instead the seizure memo Ex. P-7 is proved. Therefore, by marking the article, the contents thereof cannot be deemed to be proved automatically.
7. The Supreme Court in the case of like nature in the case of **Alamelu & Another V. State represented by Inspector of Police {(2011) 2 SCC 385}** has held as under:

“42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit* (1988 Supp SCC 604), observed as follows: (SCC pp. 618-19, para 14)

“14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10,

11 and 12 would not tantamount to proof of all the contents or the correctness of the date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Jaiswal* [(2003) 8 SCC 745], where this Court observed as follows: (SCC P.751 para 16)

"16.....The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

Therefore, by mere marking the document as an article, the contents cannot be automatically held to be proved.

8. Further in the case of ***Birad Mal Singhvi Vs. Anand Purohit*** {AIR 1988 SC 1796}, the Supreme Court has observed thus in para 24 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 of 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.

9. Therefore, on the basis of the aforesaid principles, the contents of the Article A, which was seized by Ex. P-7, cannot be accepted as a proved document. As a result, the age in the Article A i.e. the Marksheet cannot be said to have been conclusively proved by the prosecution.

10. Now turning to the statement of Dr. P. Khapre, in order to prove the age, who is examined as PW-14. According to the doctor, the prosecutrix was examined on 15.02.1996 almost after 1 & ½ month of the incident and her radiological age was opined from 16 to 17 years. The document to this effect was marked as Ex. P-17. So far as, the radiological report is concerned, in Modi's Jurisprudence (20th Edn.), it is stated that too much reliance should not be placed on the table showing the age and years of appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be upto 3 years on either side. Relying on the said analogy, this Court in Tirithram Vs. State of M.P. (Now C.G.), 2012 (2) CGLJ1 held thus in para 7 :

".....The Radiologist has found that the prosecutrix was aged about 16 years on the date of incident. If we add 3 years to the said finding of 16 years recorded by the radiologist the age of the prosecutrix would come to 19 years. In fact, except the above Radiologist report, there is no reliable evidence regarding age of the prosecutrix. I am of the opinion that in the above facts and circumstances, the learned Sessions Judge has

wrongly held that the prosecutrix was minor on the date of incident and the above finding cannot be sustained.”

11. Therefore, applying the aforesaid principles in this case, when the father has categorically failed to prove the age of the prosecutrix that she was a minor, further in his cross-examination has pointed out the presumptive age to 20 – 21 years as per the gap in between the children, reading of the same analogously with Ex. P-17 and considering the benefit of margin, it can be safely presumed that the prosecution has failed to prove the age of the prosecutrix that she was a minor on the date of the incident. Further the incident was of the year 1995, the Section 375 of the IPC, which was amended w.e.f. 03.02.2013 prior to the substitution was as under:

375. Rape. - A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First. xxx xxx xxx

Secondly. xxx xxx xxx

Thirdly xxx xxx xxx

Fourthly xxx xxx xxx

fifthly xxx xxx xxx

Sixthly. -With or without her consent, when she is under sixteen years of age.

12. Therefore, in this case, the prosecution has miserably failed to prove the age of the prosecutrix that she was a minor. Rather the document exhibited by the prosecution if are accepted, on the face value, the Ex. P-17, the radiological report, the age is shown to be starting from 16 to 17 years. In a result, the finding of the Court below that the prosecutrix was a minor on the date of incident cannot be upheld.

13. Now evaluating the statement of the prosecutrix, the principle as laid down by the Supreme Court in the case of Narendra Kumar Vs. State (NCT of Delhi) {(2012) 7 SCC 171} would be relevant. In the said judgment at paras 21 & 22 thus was held as under:

21.....A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony. (Vide: [Vimal Suresh Kamble v. Chaluverapinake Apal S.P.](#) (2003) 3 SCC 175; and *Vishnu alias Undrya vs. State of Maharashtra*, (2006) 1 SCC 283)

22.Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with the other material, the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part and there

being no injury on her persons even though her version may be otherwise, no reliance can be placed upon her evidence.

(Vide: [Suresh N. Bhusare & Ors. v. State of Maharashtra](#), (1999) 1 SCC 220)”

14. In the light of the aforesaid principles, the statement of the prosecutrix who is examined as PW-4, wherein she has narrated that when she went to answer nature's call, the appellant caught hold of her hand and took her forcefully in a truck to some other place, thereafter, they went to village wherein she was subjected to forceful sexual intercourse. The prosecutrix has further stated that thereafter she went to some relatives place of the appellant, wherein she stayed for 2-4 days, thereafter also she went to village Pedikapa, thereafter, she went to village Lava, where also they stayed for 2-3 days and thereafter they came back to their own village and she stayed there for 2 days. In the cross-examination, she was confronted with the statement under Section 161 Cr.P.C., which is marked as Ex. D1. Perusal of the statement under Section 161 Cr.P.C. (Ex. D1), she has stated that she went to the house of Dulari, wherein she met Gita Bai and stayed there. Thereafter, the villagers accumulated and started shouting that the prosecutrix is staying in the house of the appellant as Dulari is the sister of the appellant. Subsequently, the Panchayat was held in the village and it was deliberated that the prosecutrix had an illicit relations with the appellant. Subsequently, in the night, the appellant told that their names have been maligned, as such in order to avoid that, they went to marry and thereafter fled away and subsequently, they went to different village and came to Bilaspur, wherein she stayed in a house and thereafter in the Radha Krishna Mandir vermilion was put on her forehead hair partings. She further admitted that in the Panchayat, it was told by the appellant that the

Panchayat people wanted to assault and abuse the appellant and therefore, she went along with the appellant and fled away.

15. Statement of the prosecutrix along with the statement under Section 161 Cr.P.C., it do not inspire confidence to admit the allegation that the appellant allured and enticed away the minor girl from the lawful custody of the parents. The prosecution in this case has failed to prove that the prosecutrix was a minor on the date. Further the statement would show that she remained in the company of the appellant for a considerable time, traveled different places, stayed in the different locations, but never objected or made any hue or cry against the act of the appellant. Therefore, in the totality, it would lead to show that she was a consenting party to be in the company of the appellant and furthermore the statement under Section 161 Cr.P.C. she stated that she performed marriage and confirmed the fact that they went to temple and vermilion was put on her forehead, which would show that she remained willingly in the company of the appellant as wife. Therefore, taking into the totality of the facts, the finding arrived at by the trial Court cannot be sustained.

16. In view of the above, the appeal succeeds and is allowed. Consequently, the judgment of conviction and order of sentence passed by the learned trial Court cannot be allowed to sustain and is hereby set aside. The appellant is acquitted of the charges leveled against him. The appellant is on bail, his bail bonds shall continue for a period of 6 months in view of the provisions contained under Section 437-A of Cr.P.C.

Sd/-

Goutam Bhaduri
Judge