

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved for Judgment on : 28.08.2018****Judgment delivered on : 10/09/2018****CRA No. 1027 of 2014**

- Rajat Vaisnav S/o. Mukesh Vaishnav, Aged About 19 Years, R/o. Vill. Darrabandha, Police Station Chichola, District Rajnandgaon C.G., Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through P.S. Dongargaon, Distt. Rajnangaon C.G., Chhattisgarh

-----Respondent

For Appellant	: Shri Arun Kochar, Advocate
For Respondent/State	: Shri Lav Sharma, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Judgment****10/09/2018**

1. This appeal has been preferred against judgment dated 09-10-2014 passed in Special S.T. No.29/2014 by Additional Sessions Judge, FTC, Rajnandgaon, C.G. convicting the appellant under Section 363, 366 376 of the IPC and Section 4 of the POCSO Act and sentencing him with R.I. for 5 years along with fine Rs.500/-, R.I. for 7 years along with fine Rs.500/-, R.I. for 10 years along with fine Rs.1000/- and RI for 7 years along with fine Rs. 500/- respectively, with default stipulations and all the sentences are directed to be run concurrently.
2. The case against the present appellant is this, that the prosecutrix aged about 16 years went missing on 03-04-2014. The FIR and missing report was lodged by Devendra Vaisnav (PW-1), father of

the prosecutrix and on that basis offence under Section 363 of the IPC was registered against unknown person. The minor prosecutrix was recovered from the custody of this appellant on 07-04-2014 vide Ex.-P/2. On the basis of the statement given by the prosecutrix and her medical examination report, further offences of rape and offence under the provision of the POCSO Act were also added in the investigation. After completion of the investigation, charge sheet was filed before the concerned Court. The trial Court charged the appellant with offence under Section 363, 366, 376 of the IPC and under Section 4 of the POCSO Act. The appellant denied the charges and prayed for trial.

3. On completion of the evidence for prosecution, the appellant was examined under Section 313 of the CrPC in which he has denied all the incriminating evidence against him, pleaded innocence and false implication. No witness was examined in defence. On completion of the trial, the impugned judgment was passed in which the appellant has been convicted and sentenced as aforementioned.
4. It is submitted by the counsel for the appellant that a totally erroneous judgment has been passed by the trial Court without appreciating the evidence on record, which shows that the prosecution has not proved its case beyond reasonable doubt. It should have been appreciated that the prosecutrix had willingly left her paternal home and accompanied the appellant as both of them were having affair. While visiting various places the prosecutrix never raised alarm or tried to escape from the custody of the appellant which further shows her consent. The age of the prosecutrix was below 18 years is not proved beyond reasonable

doubt by the prosecution. The entry in school register is not a conclusive proof. The medical evidence also does not support the prosecution case that the prosecutrix was raped, as the prosecutrix was a consenting party. Further, according to the statement given by Dr. Kiran Dhandekar (PW-10) while examining the prosecutrix, she was informed that the prosecutrix had her menstrual cycle on 3rd April, 2014 which normally continues for 5 days and the date of recovery, i.e., 7th of April, 2014 is within those 5 days, which shows that the prosecution has come up with an improbable story of commission of the offence of rape in this case. Hence, for these reasons, the appellant was entitled to be acquitted in the case concerned. It is prayed that the appeal may be allowed and the appellant be acquitted of charges.

5. Learned counsel for the applicant placed reliance on the judgments of this Court in the matter of **Ashok Kumar Vs. State of C.G.**, reported in 2016(1) C.G.L.J. 367, which is based on findings of the facts and reliance on the same cannot be applicable in the case. Reliance has also been placed on the judgment of this Court in the matter of **Rajkumar & Another Vs. State of C.G.**, reported in 2016(3) C.G.L.J. 550, which is based on medical report, no opinion was given by the examining doctor, hence, the appellate Court had allowed the appeal on this point; which is again finding of the fact. In this case the same has to be appreciated on the basis of the evidence present in this case. On this point, further reliance has been placed on the judgment dated 12-04-2018 of this Court passed in **Criminal Appeal No.885 of 1999 [Kalyan Singh Vs. The**

State of Madhya Pradesh (Now Chhattisgarh)].

Learned counsel for the appellant also placed reliance on the judgments of this Court in the matter of **Sanjay Kumar Nayak Vs. State of C.G.**, reported in 2017(2) C.G.L.J. 579, which is based on the point of radiological examination of the age. When there is no evidence regarding exact date of birth, the radiological examination of the age is resorted to. It is not a similar case here, hence, this citation does not help the appellant. On behalf of the appellant reliance has also been placed on the judgments of this Court in the matter of **Guruprasad & Another Vs. State of M.P. (Now C.G.)**, reported in 2016(3) C.G.L.J. 13, and **Rajesh Alias Kameshwar Soni Vs. State of M.P.**, reported in 2010(4) C.G.L.J. 324.

Learned counsel for the appellant also placed reliance on the judgment dated 05-04-2010 of this Court passed in **Criminal Appeal No.435 of 1992 (Roshan Lal S/o Sarju Prasad Gupta Versus State of Madhya Pradesh)**. Reliance has also been placed on the judgment delivered on 12th January, 2010 of this Court in **Criminal Appeal No.522 of 1991 (Ramadhin Versus State of M.P.)**.

6. It is submitted that in the matter of **Alamelu and Others Vs. State represented by Inspector of Police and Others**, reported in (2011) Cr.C.P.(S.C.) 138, Hon'ble the Supreme Court has held that a girl who has remained in company with the accused for couple of days cannot be said to have accompanied him on compulsion and it was also held that the date of birth mentioned in transfer certificate has no eventiary value unless the person making entry is examined

before the Court.

Reliance has also been placed on the judgment delivered by Hon'ble the Supreme Court in the matter of **Uday Versus State of Karnataka**, reported in 2003 SCC (Cri) 775, which does not attract in this case as in that case the prosecutrix was a major girl and there had been evidence that she was consenting party.

7. It is submitted that in the matter of **Naravan @ Naran Versus State of Rajasthan**, reported in 2007 SAR (Criminal) 579 Supreme Court, Hon'ble the Supreme Court has held that when the evidence of prosecutrix is full of material contradictions without corroboration, that cannot be relied upon. Further reliance has been placed on the judgments delivered by Hon'ble the Supreme Court in the matter of **Tameezuddin @ Tammu Versus State of (NCT) of Delhi**, reported in 2009 SAR (Criminal) 933 and **Lalliram and Anr. Versus State of M.P.**, reported in 2008 SAR (Criminal) 815 Supreme Court.
8. Per contra, learned counsel for the State opposing the appellant's submission, submits that the prosecution has proved its case beyond reasonable doubt, as the prosecutrix has herself supported the prosecution case completely. Secondly, the entry in the school register has presumptive value unless the presumption is rebutted by some cogent and clear evidence and there is no such evidence brought on record by the defence, which shows that the prosecutrix was not competent to consent. Hence, the offence of rape is clearly made out against the appellant. Hence, it is prayed that the appeal may be dismissed.
9. The case of the appellant has to be examined on two points, firstly,

about the willingness of the prosecutrix and her affair with the appellant and secondly on the point of age of the prosecutrix whether or not she was minor on the date of incident.

10. On the point of willingness, the statement of the prosecutrix herself is important. The prosecutrix (PW-3) has stated that when she was on her way to home from temple the appellant came on a bike and offered her lift, then he by force took her to Raipur and by keeping her in a place by force and without her consent had sexual intercourse with her. In cross-examination this witness was confronted with her previous statement (Ex.-D/3) and it appears that she has made a statement, that firstly she was taken to Dongargarh. Which is omission before the Court, that firstly she was taken to Dongargarh. On asking as to why she did not make her escape, she has stated that she had been afraid from jumping from the motorcycle and she was under the threat given by the appellant and she has further clarified that her mobile was broken by the appellant, because of which she was unable to contact her family members. Similarly, she has also denied her earlier statement (Ex.-D/3) about going to Village Murra, where the maternal grand-mother of the appellant resides and it was there where she was raped by the appellant. She has also omitted to state another portion of her earlier statement that when she was in Raipur with the appellant then her uncle found them and took them to the police station.

On perusing her full statement in cross-examination, it appears that she has not made any admission that she had willingly accompanied the appellant.

11. Other relevant statement has been made by Devendra Vaisnav (PW-1) who has lodged the FIR and missing report (Ex.-P/1). He has stated that on asking the prosecutrix she informed him that the appellant has offered her lift in motorcycle and he took her to Raipur by putting her under threat and also after destroying her mobile phone. In cross-examination no question has been put to this witness about any previous affair of the appellant with the prosecutrix and also that the prosecutrix had willingly accompanied the appellant to various places.
12. Kusumlata (PW-2) has not made any specific statement in her examination-in-chief. She is mother of the prosecutrix, in her cross-examination she has denied that her daughter had accompanied the appellant willingly for having a ride on motorcycle, and there is no other statement in her whole deposition admitting the suggestion of the defence that the prosecutrix had willingly accompanied the appellant.
13. Jagvendra Vaisnav (PW-4) is uncle of the prosecutrix. He has stated that he made a call on mobile phone to the appellant, who received it and informed him that he is in Dongargarh with the prosecutrix and then he asked them to come to Raipur. On arrival of appellant and the prosecutrix he took both of them to the father of the prosecutrix. In cross-examination he has admitted that the prosecutrix has told him that she does not want to go home and her father should not be informed.
14. Kokila Vaisnav (PW-9) who is maternal grand mother of the appellant, has stated before the Court, that on one night the

appellant and the prosecutrix both came to her house and stayed for a night. Both had slept separately and both of them left next morning. Her statement has remained unchallenged.

15. On examining the witnesses whose statement are relevant on the point for consideration about the willingness of the prosecutrix, it appears that the prosecutrix (PW-3) has deliberately made some omissions regarding visit to Dongargarh and visiting the place of maternal grand-mother of the appellant, whereas, the IO, Inspector Anju Chelak (PW-11) has stated before the Court, that she has recorded the statement under Section 161 of the Cr.P.C. of the Prosecutrix (Ex.-D/3) according to the statement given by her and secondly Kokila Vaisnav (PW-9) is another witness examined by the prosecution and on whom the prosecution relies.
16. The Prosecutrix (PW-3) is partly reliable and partly unreliable on the point of her willingness. She happened to be only witness who can give statement in clear terms whether she had on her own will accompanied the appellant or not. The omission made by her shows her reluctance. Further, the circumstance speaks for itself that the prosecutrix had been along with the appellant from 03-04-2014 to 07-04-2014 and the statement given by Jagvendra Vaisnav (PW-4) in his cross-examination helps the defence that the prosecutrix had stated him that she does not want to go home and her father should not be informed. This shows that the case of the prosecution that the prosecutrix was an unwilling party cannot be held proved on the basis of shaky evidence of the prosecutrix.
17. Second point under consideration is the age of the prosecutrix

regarding which Prahlad Singh (PW-5), the Head Master from Sarswati Shishu Mandir has been examined, who has stated on the basis of school admission register, that the date of birth of the prosecutrix is recorded as 06-02-1998, Ex.-P/11 in the document produced as prosecution evidence. In cross-examination, his admission, that during investigation no other documents were asked for by the policemen is of no consequence and there is no such statement in his cross-examination which can be found as contradictory to the statement given by him in examination-in-chief and to the entry made in Ex.-P/11.

18. The other witnesses on the point of age are Devendra Vaisnav (PW-1) and Kusumlata (PW-2), the father and mother of the prosecutrix. Devendra Vaisnav (PW-1) has stated clearly that date of birth of his daughter is 06-02-1998 and his statement has remained unrebutted in cross-examination. The questions were put about the documents mentioning the date of birth of the prosecutrix which were not produced by him before the police or before the Court by itself does not falsify his statement as he is the best person to have the knowledge of date of birth of the prosecutrix. Kusumlata (PW-2) has stated in her cross-examination that one of her child has birthday on 6 February and another child has birthday on 14th May and according to her knowledge the prosecutrix is of age 16 years and that she was married at the age of 20 years and after 1 and ½ years her daughter Pinki was born, are vague statements, which cannot be considered as cogent and reliable evidence to rebut or contradict the evidence regarding date of birth of the prosecutrix which has

been brought by the prosecution before the Court through school register and through the statement given by the father of the prosecutrix Devendra Vaisnav (PW-1). Hence, under these circumstances, on scrutinizing the evidence on the point of date of birth of the prosecutrix, it is found that the prosecution has proved this point beyond reasonable doubt that age of the prosecutrix (PW-3) was below 18 years and about 16 years on the date of incident.

19. Doctor Kiran Dhandekar (PW-10) has stated that while examining the prosecutrix on 08-04-2014 she did not found any injuries on the private parts, her secondary sexual characters were well developed and vide her report Ex.-P/13 she had not found any symptom regarding sexual intercourse. The clothes of the prosecutrix was preserved by her which were sent for FSL examination and she has also stated that the prosecutrix had menstrual cycle on 03-04-2014, although this has not been informed as to whether her menstrual cycle started on 03-04-2014 or ended on 03-04-2014. The FSL report regarding vaginal slides regarding the prosecutrix and her undergarments is negative vide FSL report Ex.-P/20.
20. After considering on the entire evidence and looking to the contradiction that has been established by the defence in the evidence of the prosecutrix that she was raped in a place in Raipur, whereas, she has made statement under Section 161 of the Cr.P.C. in Ex.-D/3 that she was raped in village Murra which is a place of Kokila Vaisnav (PW-9), who has herself stated that the appellant and the prosecutrix stayed in night in her place and slept separately, is the material contradiction and she has not been declared hostile

by the prosecution. Hence, on the point of this allegation that the prosecutrix was raped by the appellant, I am of this opinion that the evidence of the prosecution is unreliable and it is not proved beyond reasonable doubt that the prosecutrix was raped by the appellant while she was in his company between 03-04-2014 to 07-04-2014.

21. After due consideration on all the evidence present on record this conclusion has drawn that the prosecutrix is minor of age about 16 years, the appellant by taking her with him away from lawful guardianship has committed the offence of abduction, the offence under Section 363 of the IPC, whereas, the evidence on the point of commission of offence under Section 366 and 376 of the IPC and Section 4 of the POCSO Act has been found not proved, because of which, conviction of the appellant under these sections is bad in law.
22. Consequently, the appeal filed by the appellant is allowed in part. Conviction and sentence of the appellant under Section 363 of the IPC is upheld, whereas, conviction of the appellant under Section 366, 376 of the IPC and Section 4 of the POCSO Act are set aside. Fine sentence awarded by the trial Court under Section 363 of the IPC is also maintained.
23. The appeal stands disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge