

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.340 of 1999

Sitaram, aged 29 years, son of Ferhasingh Kurmi, occupation agriculturist, resident of Village Bera, Police Station Bemetara, District Durg, M.P. (now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh)

--- Respondent

For Appellant	:	Shri V.G. Tamaskar, Advocate
For Respondent	:	Shri U.K.S. Chandel, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

30.7.2018

1. This appeal is directed against the judgment dated 28.1.1999 passed by the Additional Sessions Judge, Bemetara, District Durg in Sessions Trial No.389 of 1992 convicting and sentencing the Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.500/- with default stipulation

2. Case of the prosecution, in brief, is that on 19.8.1992 at about 12:00 noon, the prosecutrix (PW1), a girl below 16 years of age, had gone to a shop to purchase some articles. It is alleged that the

Appellant came there and enticing her took her to a room situated in an agricultural field and committed forcible sexual intercourse with her there. Madan Singh (PW6), father of the prosecutrix lodged First Information Report (Ex.P5). The prosecutrix was medically examined by Dr. Madhu Shrivastava (PW11). Her report is Ex.P10 in which she found no injury over any part of the body of the prosecutrix. Two fingers were easily being inserted into her vagina. No definite opinion could be given regarding sexual intercourse with the prosecutrix. She advised for ossification test of the prosecutrix for determination of her age. The ossification test was done by Dr. G.S. Thakur (PW9). His report is Ex.P9. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant for the offences punishable under Sections 363, 366, 376 and 342 of the Indian Penal Code. Charges were framed against him under Sections 363, 366 and 376 of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 13 witnesses. Statement of the Appellant was recorded under Section 313 of the Code of Criminal Procedure in which he denied the guilt, pleaded innocence and false implication. 2 witnesses have been examined in his defence.
4. After trial, the Trial Court acquitted the Appellant of the charge under Section 376 of the Indian Penal Code, but convicted him under Sections 363 and 366 of the Indian Penal Code and sentenced him as mentioned in the first paragraph of this judgment. Hence, this appeal.

5. Learned Counsel appearing for the Appellant submits that there is no conclusive evidence on the basis of which it could be established that the age of the prosecutrix (PW1) was below 18 years. From the evidence adduced by the prosecution, it is clear that the prosecutrix was a consenting party to the act done with her. Therefore, no offence is made out against the Appellant and he deserves acquittal.
6. Per contra, Learned Counsel appearing for the State opposes the arguments advanced on behalf of the Appellant and supports the impugned judgment of conviction and sentence. He submits that at the time of incident, the prosecutrix was below 18 years of age and, therefore, the Trial Court has rightly convicted and sentenced the Appellant.
7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. The prosecutrix (PW1) has stated that when she had been going to her school for studies, on the way, the Appellant used to tease her. In the month of *Fagun* (according to the Hindu Calendar), when she had gone to the house of her *Bhabhi* (sister-in-law) Ferhin Kurmi, there also the Appellant had committed forcible sexual intercourse with her. 5-6 months thereafter, at about 12:00 noon, she along with Kirtanbai (PW3) had gone to attend the call of nature towards the field. At that time, the Appellant was sitting across the pond over its boundary. The Appellant, scolding Kirtanbai (PW3), made her run away from there and alluring her that he will marry her took her to the room of the pump house. He

locked the said room from inside and thereafter committed sexual intercourse with her there twice. Mother and aunt of the Appellant and other villagers reached there and asked the Appellant to open the door of the said room, but he did not open the door. When Tirath told the Appellant that they will arrange his marriage with her then he opened the door of the room. In paragraphs 12 and 14 of her cross-examination, she has admitted that when the Appellant had committed forcible sexual intercourse with her at the house of Ferhin Kurmi, at that time, she had not resisted him nor had she shouted. In paragraph 23 of her cross-examination, she has further admitted the fact that her family members had been asking her not to meet with the Appellant. In paragraph 33 of her cross-examination, she has stated that they had gone to the room of the pump house from across the pond through the way constructed over the boundary of the pond. The Appellant was walking ahead of her and she was following him and about 15 minutes had taken to reach the room of the pump house. She has further admitted that the Appellant had committed sexual intercourse with her in the said room of the pump house twice.

9. Kirtanbai (PW3) has also admitted the fact that prior to the incident, both the Appellant and the prosecutrix used to meet with each other and they had acquaintance with each other. From the statements of the prosecutrix (PW1) and Kirtanbai (PW3), it is clear that there was a love relation between the Appellant and the prosecutrix. They also used to meet with each other earlier to the alleged incident. From the statement of the prosecutrix, it is also clear that before the present incident also, the Appellant had committed sexual intercourse with her and she had not disclosed

the same to anyone. From the statement of the prosecutrix, it is also clear that on the date of the present incident, she had gone behind the Appellant to the room of the pump house. Had the Appellant been taking her forcibly along with him to the said room, she would have raised her voice for help or would have run away from there for which she had ample opportunity. But, she did not do so and followed the Appellant till the room of the pump house. Hence, it is established that she was a consenting party.

10. In her Court statement, the prosecutrix (PW1) has stated that her date of birth is 14.4.1977. She has admitted the fact that in the school also, the same date of birth is registered and on the basis of that only she had stated her date of birth.
11. Madan Singh (PW6) is father of the prosecutrix. Though he has stated that at the time of incident, the age of the prosecutrix was 15 years, he had admitted the fact that he has total 5 children and except the prosecutrix he does not know date of birth of his other children. He has also admitted the fact that he had gone to the Kotwar for recording of date of birth of the prosecutrix, but no Kotwari register has been produced by the prosecution. Even the school register has not been produced by the prosecution to disclose the date of birth of the prosecutrix.
12. Dr. G.S. Thakur (PW9) is the witness who conducted ossification test of the prosecutrix. He has stated that his report is Ex.P9 in which he opined that the prosecutrix was aged about 17 years. He has admitted the fact that there could be variation of 3 years on both sides.

- 13.** From the above, it is clear that there is no conclusive evidence on record on the basis of which it could be determined that the age of the prosecutrix was below 18 years. Since she was a consenting party and no evidence is available on record to the effect that the Appellant had taken her forcibly or by alluring her, it is also not established that on the date of incident she was below 18 years of age, she had a love relation with the Appellant and she had gone along with him at her own will, no offence under Sections 363 and 366 of the Indian Penal Code is made out against the Appellant.
- 14.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charges framed against him.
- 15.** It is reported that the Appellant is on bail. His bail bonds shall continue for a further period of six months in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
- 16.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
Judge