

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 12-10-2018****Pronounced on 24-10-2018****CRIMINAL APPEAL No. 411/2000**

(Arising out of the judgment of conviction and order of sentence dated 19-1-2000 passed by the Special Judge, Raigarh constituted under Scheduled caste & Scheduled tribe Prevention of Atrocities Act 1989 in Special Case No. 10/1998)

1. Kariya alias Shiv Kumar son of Radheshyam, aged 25 years, occupation labour, r/o. Mithhumuda, PS Raigarh
2. Choubey alias Vijay (since deceased)
3. Shiv Yadav son of Sukhdev Yadav, aged 20 years, R/o Mithhumuda, P.S. Raigarh
4. Baboolal son of Kunjal Yadav aged 25 years, occupation Pan Shop R/o. Mithhumuda, Raigarh, Distt. Raigarh.

---- Appellant**Versus**

State of MP (now CG)

---- Respondent

For appellants : Smt. Savita Tiwari, Advocate.

For Respondent/State : Shri Ashok Kumar Swarnkar, Panel Lawyer.

Hon'ble Mr. Sharad Kumar Gupta, Judge**C.A.V. JUDGMENT**

1. In this criminal appeal, challenge is levied to the judgment of conviction and order of sentence dated 19-1-2000 passed by the Special Judge, Raigarh constituted under Scheduled caste & Scheduled tribe (Prevention of Atrocities) Act 1989 (hereafter called as 'S.C. & S.T. Act') in Special Case No. 10/1998 whereby and whereunder he convicted and sentenced the appellants as under:-

Sr. No.	Offence u/S.	Sentence
1.	354, Indian Penal Code (for short 'IPC')	RI for 2 years

2. In brief the prosecution story is that the date of birth of the prosecutrix is 2-3-1984. She was resident of Mitthumuda, Raigarh. She is a member of scheduled tribe. On 13-1-1998 at about 9 pm she had gone to see Jai Hanuman serial at the house of Natthu Tailor. At that time she had come out side for toilet. Said appellants, co-accused Rajesh, Darsh alias Dasrath who are neither member of scheduled caste nor scheduled tribe, stuffed her mouth by cloth, took away, confined her, gave threats to kill her and committed gang rape. On 14-1-1998 she lodged the FIR in police station Kotwali Raigarh. After completion of the investigation the charge-sheet was filed against them under Sections 342, 506-B, 363, 366, 376/34 of the IPC and & 3(1)(XI) of the S.C & S.T. Act. The trial Court framed charges against them under Section 342, 363, 366, 376(2)(ड), IPC, Section 3(1)(xi), S.C & S.T. Act. They abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 13 witnesses. They did not examine any witness on his defence. After conclusion of the trial, trial court acquitted co-accused Rajesh, Darash alias Dashrath of all the charges, acquitted appellants of the charges punishable under Section 342, 506-B, 363, 366, 376(2)(ड) IPC, Section 3(1)(xi) of the S.C. & S.T. Act but convicted and sentenced them as aforesaid. Being aggrieved, the appellants have preferred this criminal appeal. During the pendency of the appeal, appeal was abated against appellant No. 2 Choubey alias Vijay on account of his death and the appeal continued against the appellants No. 1 Kariya alias Shivkumar, No. 3 Shiv Yadav, No. 4 Babulal.

3. Smt. Savita Tiwari, counsel for the appellant strenuously argued that the prosecution has failed to prove that the age of prosecutrix was below 16 years. She was the consenting party. Thus, aforesaid conviction and sentence are bad in the eyes of law and not sustainable.

Thus, aforesaid conviction and sentence may be set aside.

4. Shri Swarnkar, Panel Lawyer for the State submitted that aforesaid conviction and sentence are based on clinching evidence led by the prosecution. He supported the aforesaid conviction and sentence and submitted that no interference is called for by this Court.

5. The first and foremost question for adjudication before this court is as to what was the age of prosecutrix on 13-1-1998.

6. P.W. 2 Gowardhan Lal Mehra who is father of the prosecutrix says in para 4 and 7 of his statement given on oath that on the basis of school certificate, the date of birth of prosecutrix is 2-3-1984.

7. As per the alleged seizure Ex. P-3 primary certificate examination 1996 of the prosecutrix was seized wherein the date of birth of the prosecutrix was mentioned as 2-3-1984.

8. As per the report of the radiologist Ex. P-6 the age of the prosecutrix was between 14 to 15 years.

9. In **Birad Mal Singhvi v. Anand Purohit** (AIR 1988 SC 1796) the Hon'ble Supreme Court observed in paras-14 and 15 as under:

“14.....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 by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 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 Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.....

15. ...To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly,

it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded....”

10. In **Babloo Pasi v. State of Jharkhand and Another** (2008 AIR SCW 7332), Hon'ble Supreme Court in para 22 observed as under:-

“**22.** Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

11. It would be manifest to refer para-25 of the judgment of the Supreme Court in **Sunil v. State of Haryana [2010 (1) SCC 742]** which is extracted as under:-

“**25.** The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding

the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.”

12. In **Alamelu and another Vs. State represented by Inspector of Police**, (2011) 2 SCC 385, the Supreme Court held :

“that the transfer certificate which is issued by a government school and is duly signed by Headmaster would be admissible in evidence u/s 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.”

13. P.W. 1 prosecutrix, P.W.3 Jharna who is mother of the prosecutrix do not say the exact date of birth of the prosecutrix and reasons therefor.

14. In the case in hand prosecution has failed to prove said original certificate. Prosecution failed to examine the author who had made such entry in school register, declaration form at the time of the admission of prosecutrix. The prosecution also failed to examine any person who had special means of knowledge of the aforesaid date of birth of prosecutrix which he/she had informed it at the time of admission of her, to the concerned authority which has been written in the school register, declaration form, that could have been main source of information for the date of birth of the prosecutrix. The prosecution

failed to give any explanation as to why it was not done.

15. In **Jaya Mala v. Home Secretary, Government of Jammu and Kashmir And Others** {AIR 1982 SC 1297} the Hon'ble Supreme Court has observed that margin of error in age ascertained by radiological examination is two years on either side.

16. Looking to the aforesaid facts and circumstances of the case, judicial precedents laid down by Hon'ble Supreme court **Birad mal singhvi (Surpa), Babloo pasi (Supra), sunil (Supra), Alamelu (Supra)** this court disbelieves aforesaid statement of P.W. 2 Goverdhan Lal Mehra, Ex. P-3 in the reference that on 13-1-1998, prosecutrix was below 16 years of age.

17. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that on 13-1-1998 the age of prosecutrix was below 16 years.

18. Now the second question for adjudication before this court is that whether prosecutrix was allegedly a free consenting party.

19. In **Rajkumar Bajaj @ Raja v. State of C.G. {2012 (4) CGLJ 437}** the learned Single Judge of this Court has observed in para-9 as under :-

“9. Minute examination of the evidence of the witnesses particularly that of the prosecutrix (PW-3), her parents (PW-1 and PW-2) and Laxmi Bai (PW-9) goes to show that she (prosecutrix) was a consenting party. Evidence further shows that the prosecutrix lived in the house of Dhaniram (PW-4) along with accused Raja for five days and used to go out for answering the call of nature and fetching water from the hand pump but during this long period she, in spite of having full opportunity, did not make any complaint to anyone about her being confined by the

accused/appellant Raja. This conduct of the prosecutrix also makes it clear that she was consenting party to the act of accused/appellant Raja. Now the only question is regarding her age. Prosecution has filed photocopy of the *Kotwari* register (Ex. P-15-A) but even this document has not been proved by the prosecution in accordance with law. Original *Kotwari* register has not been produced in the Court by the prosecution nor there is any evidence to show as to on what basis the date of birth of the prosecutrix was entered in the said *Kotwari* register as 20.07.1980. Even the parents of the prosecutrix have not stated anything regarding the age of the prosecutrix. Moreover, the doctor (PW-8) who medically examined the prosecutrix has stated that she was a fully grown up woman. Though the record shows that prosecutrix was referred for x-ray for determination of age, there is no such report on record”

20. In **Subelal (Now C.G.)** [2011(4) CGLJ 424] in para-12 the learned Single Judge has observed as follows:-

“12. Now we shall examine the conduct of the prosecutrix. The case of the prosecution is that the prosecutrix accompanied the appellant and she went from village Zoratarai to village Bhakara on his bicycle. From Bhakara, they boarded a bus and went to Dhamtari. Further, from Dhamtari, they went to village Utai to the house of the sister of the appellant, they again boarded a mini bus and went to Bhilai (Power House). The appellant took the prosecutrix to the house of his other sister who was residing in Bhilai. The prosecutrix alleges that she was subjected to forcible sexual intercourse by the appellant in the house of his sister. Though the prosecutrix visited many places with the appellant, but she did not make any complaint and accompanied him in normal manner. This shows that she was not abducted and was not taken by force and she accompanied the appellant on her own will and it was not a case that the appellant committed sexual intercourse without her consent. Considering the evidence of age and conduct of the prosecutrix, I am of the view that the prosecutrix was a consenting party with the appellant and in the above facts and circumstances of the case, the offences under Sections 363, 366 & 376 Indian Penal Code would not be made

out against the appellant. ”

21. P.W. 1 Prosecutrix says in para 6 during her cross-examination that after his house and towards pond there are so many houses.

22. P.W. 1 prosecutrix says in para 6 that P.W. 4 Vidyadhar had met her near the spot. P.W. 3 Jharna says in para 5 during her cross-examination that P.W. 4 Vidyadhar had met the prosecutrix near the spot.

23. P.W. 4 Vidyadhar says in para 1 of his statement given on oath that during the searching for the prosecutrix he had seen she and appellant Babulal were standing in normal condition near the nala. He was not declared hostile by the prosecution. He does not say that after seeing him she screamed or raised alarm or made hue and cry to get help.

24. In the case in hand trial Court has acquitted appellants and said co-accused from the charges punishable under Section 363, 366, IPC. Trial Court has given the finding in para 14 of the impugned judgment that this possibility cannot be ruled out that prosecutrix herself had gone along with some accused persons on the spot.

25. Looking to the above mentioned facts and circumstances of the case, judicial precedents laid down in **Rajkumar Bajaj alias Raja** (supra), **Subelal** (supra), this court finds that prosecutrix was free consenting party.

26. Looking to the above mentioned facts & circumstances of the case this court finds that, prosecution has failed to prove beyond reasonable doubt the charge punishable u/s 354 IPC .Thus trial court committed illegality in convicting and sentencing appellants No. 1, No. 3, No. 4 as aforesaid.

27. Hence the appeal is allowed. The impugned judgment of conviction and order of sentence as regards Appellants No. 1, 3 and 4 are set aside. This court acquits appellants No. 1 Kariya alias Shivkumar, appellant No. 3 Shiv Yadav, appellant No. 4 Babulal of the charge punishable u/s 354, IPC extending benefit of doubt to them.

28. The appellants No. 1, appellant No. 3 , appellant No. 4 are on bail. Their bail bond stand discharged subject to the provisions contend in Section 437-A of the Cr.P.C

Sd/-
(Sharad Kumar Gupta)
Judge