

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1397 of 2000**

Surendra Shande, S/o. Lalo Shande, Aged about 24 years, R/o.
Bapunagar, Raigarh, MP (Now Chhattisgarh)

---- Appellant

Versus

The State of Madhya Pradesh (Now Chhattisgarh) Through
Station House Officer, Raigarh, Distt. Raigarh (MP Now CG)

---- Respondent

For the appellant : Shri Afroj Khan, Advocate
For the respondent/State : Shri Wasim Miyan, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****13.4.2018.**

1. This appeal is directed against the judgment of conviction and order of sentence dated 17.5.2000 passed by Sessions Judge, Raigarh (CG) in Sessions Trial No.48/1998 wherein the said Court convicted the appellant for commission of offence under Section 363 and 366 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years on each count for kidnapping minor prosecutrix with intent to compel her to marry with him or in order that she may be forced for illicit intercourse with him.

2. In the present case prosecutrix is PW-1. To substantiate the charges under Section 363 IPC the prosecution has to establish that on 20.10.97 the prosecutrix was minor i.e. below 18 years as per Indian Majority Act, 1875. To substantiate the charges, the prosecution examined as many as 10 witness.

Ranjeet Samant (PW-2) is father of the prosecutrix. He deposed that date of birth of the prosecutrix is 12.6.1982 and as per the version of this witness (para 6) he had written the date of birth of the prosecutrix on the diary but that diary was neither produced before the investigating officer nor before the trial Court. Therefore, version of this witness is not established on the basis of any such diary.

3. Dr. MD Joshi (PW-3) is Asst. Surgeon posted in KG Hospital, Raigarh. As per the submission of this witness, he conducted ossification test of the prosecutrix and on the basis of X-ray report, he opined that age of the prosecutrix is between 14 - 15 years. This witness admitted in the cross-examination that there is possibility of variation of three years in the age calculated as per the ossification test. In this way age of the prosecutrix may be 18 years and looking to the variation it cannot be said that the prosecutrix was minor on the date of incident.

4. In the matter of **Mukarrab and other vs. State of Uttar Pradesh (2017) 2 SCC 210**, it is held as under:

“ That the age determination based on ossification test though may be useful is not conclusive -X-ray ossification test can be no means be so infallible and accurate a test to indicate the correct number of years and days of a person's life”.

5. There is no other evidence to establish the age of the prosecutrix. From the evidence adduced by the prosecution, it is not established that the prosecutrix was below the age of 18 years on the date of incident. The offence of kidnapping can be

established only when the age of the prosecutrix is proved to be below 18 years. Section 361 of the IPC Shows that whoever takes or entices any minor girl under the age of 18 years, out of the keeping of the lawful guardianship of such minor then only the offence is made out. But in the present case it is not established that the age of the prosecutrix was below 18 years, therefore, offence under Section 363 is not established.

6. As per the version of the prosecutrix, she made conversation with the appellant on 19.10.2017 to go with him. She further deposed that in the midnight at about wee hours, both travelled by train and reached to village Matghai and there they stayed in the house of paternal aunt of the appellant. She further deposed that she stayed with the appellant in the city Balangir and again they travelled to Dashrajpur and in Balangir they stayed for 10-12 days. Looking to the entire evidence of the prosecutrix, it appears that she stayed with the appellant in many days in different places and did not complain to anyone that the appellant forced her to marry him or forced for illicit intercourse. The trial Court is also opined that she stayed with the appellant as a consenting party and therefore, on overall assessment of the evidence it is not established that the appellant used force against the her. Therefore, offence under Section 366 is also not made out.

7. Taking into consideration of the facts, the finding arrived at by the trial Court is not sustainable under the facts and

circumstances and legal aspects of the case, therefore, the conviction and sentence passed by the trial Court is hereby set aside.

8. Accordingly, the appeal is allowed. Conviction and sentence passed by the trial Court is set aside. The appellant is acquitted of the charges under Sections 363 & 366 IPC. The appellant is reported to be on bail. His bail bonds shall remain operative for a further period of six months from today in terms of Section 437A of the CrPC.

Sd/-
(Ram Prasanna Sharma)
JUDGE