

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.74 of 2000

Judgment Reserved on : 28.11.2017

Judgment Delivered on : 21.2.2018

- 1. Aashiq Khan, S/o Sayyed Ali, aged 19 years, resident of Idgah Para, Sakti, P.S. Sakti, District Janjgir-Champa
- 2. Rajesh Singh, S/o Badri Singh Gond, aged 21 years, resident of Kanchanpur, Sakti, P.S. Sakti, District Janjgir-Champa

---- Appellants

versus

The State of Chhattisgarh, through the District Magistrate Janjgir-Champa (Bilaspur), Chhattisgarh

--- Respondent

For Appellants	:	Shri Arun Kochar, Advocate
For Respondent/State	:	Smt. Smita Ghai, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment dated 25.11.2000 passed by the Additional Sessions Judge, Sakti, District Bilaspur in Sessions Trial No.133 of 2000 convicting and sentencing each of the Appellants as under:

<u>Appellant</u>	<u>Conviction</u>	<u>Sentence</u>
Appellant No.1, Aashiq Khan	Under Sections 363, 366 and 376 of the Indian Penal Code	Rigorous Imprisonment for 2 years, 3 years and 7 years and fine of Rs.1,000/-, Rs.2,000/- and Rs.3,000/-, respectively, with default stipulation
Appellant No.2, Rajesh Singh	Under Sections 363 and 366 of the Indian Penal Code	Rigorous Imprisonment for 2 years and 3 years and fine of Rs.1,000/- and Rs.2,000/-, respectively with default stipulation

2. Facts of the case, in brief, are that on 13.1.2000 at about 11:00-12:00 O'clock in the night, Appellant No.1, Aashiq Khan wrote a letter (Ex.P1) to the prosecutrix (PW1), aged about 16 years asking her to come out of her house when he reaches out of her house and gives her a call. He also wrote in the letter that thereafter he will take her away with him and if she does not come with him, he will spoil her life. He also wrote that tranquilizer tablet (a sleeping pill), which he had given to her, be administered on her parents before her coming out of the house. The prosecutrix did so in fear. She wrote a letter (Ex.P2) to her parents and left both the letters in her room and when Appellant No.1, Aashiq Khan gave her a call from outside at about 12 O'clock in the night, she came out of her house. From there, both the Appellants took her to Village Masaniya on a cycle. Thereafter, Appellant No.1, Aashiq Khan took her to Village Kotmi and there he committed sexual intercourse with her till 15.1.2000. The matter was reported by Machhander (PW5), father of the prosecutrix vide First Information Report (Ex.P6). On 16.1.2000, the prosecutrix was recovered along with Appellant No.1, Aashiq Khan from the house of aunt (*Mausi*) of Appellant No.1 at Village Kotmi. The prosecutrix and Appellant No.1 were medically examined. 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 Appellants for offence punishable under Sections 363, 366, 376, 109 of the Indian Penal Code. Charges were framed against Appellant No.1, Aashiq Khan under Sections 363, 366 and 376 of the Indian Penal Code and against Appellant No.2, Rajesh Singh under Sections 363 and 366 of the Indian Penal Code.

3. To rope in the Appellants, the prosecution examined as many as 20 witnesses. Statements of the Appellants/accused were also recorded under Section 313 Cr.P.C. in which they denied the guilt and pleaded innocence. One witness has been examined in their defence.
4. After Trial, the Trial Court convicted and sentenced the Appellants as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellants argued that the prosecutrix was a consenting party. At the time of incident, she was aged more than 18 years. Appellant No.1, Aashiq Khan and the prosecutrix had a love affair due to which she herself left her house because her marriage was fixed somewhere else. As per the statement of Dr. S. Rajmala (PW17), her medical opinion given vide Ex.P20 and the ossification test report (Ex.P23), age of the prosecutrix was found to be about 19 years. Since the prosecutrix was a consenting party and she herself had come out of her house at her own will, the offence alleged against the Appellants is not made out. Reliance has been placed on **2011 (1) Criminal Cases Patrika (SC) 138 (Alamelu v. State)** and **2010 (II) Criminal Cases Patrika (SC) 69 (Sunil v. State of Haryana)**.
6. On the contrary, Learned Counsel appearing for the State supported the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the material available on record minutely.
8. The prosecutrix (PW1) has stated that on the date of incident at

about 5:00 p.m., Appellant Aashiq Khan gave her a letter (Ex.P1) and a sleeping pill (tablet) asking her to administer the pill on her parents and come out of her house in the night. He had threatened her also that if she would not come out of her house, he will spoil her life. She has further stated that she left a letter (Ex.P2) at her house and gave her parents the said sleeping pill by mixing the same in vegetable. Her parents slept at about 12:00 O'clock in the night. Both the Appellants reached outside her house and called her to come out of her house with her clothes early. She came out of her house with her clothes. Thereafter, she and the Appellants went to Village Masaniya on a cycle. They reached there at about 1:00 a.m. From there, Appellant No.2, Rajesh Singh returned back in the night itself. At about 7:00 a.m., she along with Appellant No.1, Aashiq Khan went to Village Kotmi by a bus. At Village Kotmi, they stayed at the house of aunt (*Mausi*) of Appellant No.1 for 3 days. She has further stated that Appellant No.1 committed forcible sexual intercourse with her during all the said three nights. Thereafter, police came there and recovered her vide Ex.P3. In her cross-examination, she has admitted that Appellant No.1 was visiting her house for the last 3-4 months. In paragraph 18, she has categorically admitted that her father was not aware of her love affair with Appellant No.1, though in paragraph 19, she has further stated that Appellant No.1 had spread a rumour about her love affair with him. She has further admitted that after sleeping of her parents and on being asked by both of the Appellants, she had come out of her house with her clothes and went away with the Appellants on a cycle. She has further admitted that she did not tell anybody at Village Masaniya that she was abducted by the Appellants. She has further stated

that while going from Village Masaniya to Village Kotmi in the bus, she did not tell anything to any passenger of the said bus. She has further admitted that at Village Kotmi, aunt of Appellant No.1 provided her and Appellant No.1 a single room and she was living in that room along with Appellant No.1 at her own will. In paragraph 43, she has further admitted that from Village Masaniya to the bus-stand, she and Appellant No.1 went on their feet and if she wanted to return home, she could return, but she did not do so.

9. Shantibai (PW2), mother of the prosecutrix, has stated that they were sleeping in the night. When they woke up in the morning, they found two letters (Ex.P1 and P2) and their daughter (the prosecutrix) was not present at their house. She has further stated that the prosecutrix was found after 4 days of her leaving the house. Machhander (PW5), father of the prosecutrix has also made the same statement.
10. Ram Singh (PW4) has stated that at about 12:30 a.m., the prosecutrix and Appellant No.1 had come to his house. On being asked, the prosecutrix had told him that she had come to marry Appellant No.1.
11. Jaitun Bi (PW8) has stated that Appellant No.1 had come to her house along with a girl at about 5:00 p.m. On being asked, they told her that they had come for hanging about and staying there for one night. Next day, they went to the house of aunt of Appellant No.1.
12. Khatun Bi (PW9), aunt (*Mausi*) of Appellant No.1 has stated that Appellant No.1 and the prosecutrix had come to her house and had stayed there for one night. Thereafter, police had come there and

recovered them. Shyamlal Soni (PW7) and Dinanath (PW15) are the witnesses before whom the police had recovered the prosecutrix vide Ex.P3. Vishwanath (PW10) and Shankar (PW11) are the witnesses before whom the police had seized the letters (Ex.P1 and P2) vide Ex.P8. Dr. D.D. Mishra (PW14) examined Appellant No.1 and gave his report (Ex.P12) in which he found that Appellant No.1 was capable of committing sexual intercourse.

13. Dr. S. Rajmala (PW17) examined the prosecutrix on 17.1.2000 and gave her report (Ex.P20) in which she found signs of recent sexual intercourse with the prosecutrix. She also found that vagina of the prosecutrix was admitting two fingers but with complaint of pain. The doctor has further stated that she had found laceration below the vagina and she had also found a small tear in the hymen of the prosecutrix. She has further stated that during the course of examination of the prosecutrix, she had told her that she had not changed her clothes. During examination, she found stains of oil on the petticoat of the prosecutrix. On being asked from the prosecutrix, she had told her that on being asked by Appellant No.1, she had applied oil on her vagina before commission of sexual intercourse with her.
14. Assistant Sub-Inspector G.P. Shriwas (PW16) and Sub-Inspector M.L. Patel (PW20) have partly investigated the offence in question.
15. From a minute scrutiny of the evidence available on record, it is clear that the prosecutrix was acquainted with Appellant No.1 from before the occurrence and Appellant No.1 had been visiting her house from before 3-4 months of the incident. It is also clear that the prosecutrix had herself come out of her house with her clothes

after giving her parents sleeping pill and had gone away along with the Appellants at her own will. She went along with the Appellants to Village Masaniya on a cycle. She stayed at Village Masaniya with Appellant No.1 for a night. From there, she went to the bus-stand along with Appellant No.1 on their feet. Thereafter, both of them went to Village Kotmi by a bus. During this period, she had ample opportunity to disclose about her abduction, but she did not make any effort. At Village Kotmi also, she stayed along with Appellant No.1 in a single room of the house of his aunt in the night at her own will. On being asked by Appellant No.1, she also applied oil on her vagina before commission of the sexual intercourse with her. From the evidence available on record, it is established that the prosecutrix had left her house at her own will and she was a consenting party to the act of commission of sexual intercourse with her.

- 16.** According to the prosecution, on the date of incident, age of the prosecutrix was 16 years. No birth certificate of the prosecutrix is placed on record. On the date of examination before the Court, the prosecutrix has stated her age to be of 16 years. Her mother Shantibai (PW2) and father Machhandar (PW5) have also stated her age to be of about 16 years, but they had not been able to state her date of birth. In voter-list of 1999 (Ex.D1), the age of the prosecutrix is mentioned as 18 years. Though her father has stated that Ward Parshad Ishwar, in their absence, had obtained signature of the prosecutrix on a paper and thereby he got her name added in the voter-list and since the period of objection to the voter-list had expired, even having knowledge, they could not get the error corrected. Dr. S. Rajmala (PW17), who examined the

prosecutrix on 17.1.2000, has categorically stated in paragraph 3 of her examination-in-chief that the prosecutrix had told her that her first menstruation had come at the age of 12 years, i.e., 7 years prior to her present medical examination. From this also, it is established that the prosecutrix, on the date of incident, was more than 18 years of age. Apart from this, ossification test of the prosecutrix was also conducted by the prosecution. The ossification test report of the prosecutrix (Ex.P23), which has been admitted by the Appellants under Section 294 of the Code of Criminal Procedure, clearly shows that the prosecutrix was aged more than 19 years. From the foregoing, it is established that the prosecutrix, on the date of incident, was not below the age of 18 years.

17. Thus, no case is made out against the Appellants.
18. In the result, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellants are acquitted of the charges framed against them.
19. It is reported that the Appellants are on bail. Their bail bonds shall continue for a further period of six months from today in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
20. 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