

A.F.R.**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 26-9-2018****Pronounced on 22-10-2018****CRIMINAL APPEAL No. 627/2002**

(Arising out of judgment of conviction and order of sentence dated 09.05.2002 passed by the Special Judge, Raipur constituted under Scheduled caste & Scheduled tribe Prevention of Atrocities Act 1989 in Sessions Trial No. 305/2000)

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Dhannuram Yadav son of Visheshar Yadav, aged 35 years, R/o. Village Patsinee P.S. Chhokra Distt. Raipur (CG)

Versus

State of Chhattisgarh through S.O. Chhokra, District, Raipur

For appellant	: Shri Atul Pandey , Advocate.
For Respondent/State	: Shri Vinod Tekam, 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 9-5-2002 passed by the Special Judge, Raipur constituted under Scheduled caste and Scheduled tribe Prevention of Atrocities Act 1989 (hereafter called as SCST Act) in Sessions Trial No. 305/2000 whereby and whereunder he convicted and sentenced the appellant as under:-

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, Indian Penal Code (for short 'IPC')	RI for 3 years + fine of Rs. 500/-	Additional RI for 1 month
2.	366, IPC	RI for 4 years + fine of Rs. 1000/-	Additional RI for 2 months
3.	376, IPC	RI for 7 years + fine of Rs. 5000/-	Additional RI for 10 months

All the substantive jail sentences have been directed to run concurrently.

2. This is admitted by appellant that prosecutrix is the member of

Scheduled caste and he is Yadav by caste, he was examined by Doctor.

3. In brief, the prosecution story is that one month prior to 09/06/2000 prosecutrix was aged about 15 years. She was resident of village Patseoni. Appellant used to say that he will marry her. One month prior to 09/06/2000 and thereafter he committed sexual intercourse with her on pretext of marriage. They had taken photographs. On 04/06/2000 he took her to stone quarry at Mandir Hasaud, by enticing on pretext of marriage. On 08/06/2000 her brother Lacchu and other persons brought her back to her parental house. On 09/06/2000 she lodged an FIR in P.S. Chhura. After completion of the investigation charge-sheet was filed against him under Sections 363, 366, 376 IPC read with Sections 3(2)(v) of the . Act. The trial Court framed charges against the appellant under Sections 363, 366, 376 IPC read with Section 3(2)(V) SCST Act. He abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 10 witnesses. He did not examine any witness on his defence. After conclusion of the trial, trial court acquitted him of the offence punishable under section 3(2)(v) of SCST Act but convicted and sentenced him as aforesaid.

4. Shri Atul Pandey, counsel for the appellant strenuously argued that the prosecution has failed to prove that the age of prosecutrix was below 18 years. She was consenting party. Thus, aforesaid conviction and sentences are bad in the eyes of law and not sustainable. Thus, aforesaid conviction and sentences may be set aside and the appellant may be acquitted of the aforesaid charges.

5. Shri Vinod Tekam, Panel Lawyer for the State submitted that aforesaid conviction and sentences are based on clinching evidence led

by the prosecution. He supported the aforesaid conviction and sentences and submitted that no interference is called for by this Court.

6. The first and foremost question for adjudication before this court is as to what was the age of prosecutrix one month prior to 09.06.2000.

7. As per the birth certificate Ex. P-7 the date of the birth of prosecutrix is 23/03/1984.

8. 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....”

9. 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.”

10. 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.”

11. 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.”

12. P.W. 1 prosecutrix, P.W.3 Lachchuram do not say clearly and strongly about the date of birth of the prosecutrix and reasons therefor.

13. P.W. 8 head constable Harkeshwar Prasad Sinha says in para 1 of his statement given on oath that he had given Ex. P-7 on the entry of the Kotwari Register.

14. In the case in hand, the prosecution failed to prove the entry of the aforesaid date of birth of prosecutrix in Kotwari Register and Declaration Form by examining the author of the same. 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 at the time of said entry to the concerned authority which has been written in the 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 the case in hand Prosecution failed to conduct the ossification test of the prosecutrix to determine her age.

16. Looking to the aforesaid facts and circumstances of the case, judicial precedents laid down by Hon'ble Supreme court in **Birad Mal**

Singhvi (Surpa), Babloo Pasi (Supra), Sunil (Supra), Alamelu (Supra) this court disbelieves Ex. P-7 in the reference that one month prior to 9-6-2000, prosecutrix was below the 18 years of age.

17. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that one month prior to 09.06.2000 the age of prosecutrix was below 18 years.

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

19. P.W.1 prosecutrix says in para no. 2, 3, 5 and 11 of her statement given on oath that at the time of alleged first rape appellant had given threatening to kill her, during the rape at Mandir Hasaud he was giving threats to kill her. At the time of first rape she had shouted, but this is not the prosecution case.

20. P.W.1 prosecutrix says in para 12 during her cross examination that she and appellant had taken photographs.

21. P.W.2 Ramji in para no. 2 and 3, P.W.3 Lachchuram and P.W.4 Tijauram in para 2 say that in the hut at Mandir Hasaud prosecutrix was present but appellant was absent. The Prosecutrix did not run away from the said hut whenever he was not present there.

22. Prosecutrix says in para 11 that at the time of first rape appellant was already married. It means that at that time she was aware with this fact that her legal marriage with him is not possible.

23. 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”

24. In **Subelal v. State of M.P. (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 u/ss 363, 366 & 376 Indian Penal Code would not be made out against the appellant.”

25. The Hon'ble Supreme Court in the matter of **Uday -v- State of Karnataka** [(2003) 4 SCC 46] held as under :-

“for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no straight jacket formula can be laid down but following factors stand out (i) where a girl was of 19 years of age and had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge the prosecutrix has consented in consequence of a misconception of fact arising from his promise, (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. On the basis of the above factors this court did not feel persuaded to hold that consent was obtained by misconception of fact on the part of the victim.”

26. In the matter of **Deepak Gulati -v- State of Haryana** [(2013) 3 SCC 675, Hon'ble Supreme Court has laid down following judicial precedent that -

“merely because accused could not keep his promise on account of unavoidable circumstances, prosecutrix cannot be said to have given her consent under misconception of fact arising from any false promise of marriage.”

27. As per the provisions of Section 375 of the IPC, Sixthly [the

Criminal Law (Amendment) Act, 2013 came into force on 3rd day of February, 2013] a man is guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 18 years of age. Before this amendment for constituting this offence the age of prosecutrix was under 16 years.

28. Looking to the above mentioned facts and circumstances of the case, Judicial Precedents laid down by learned Single judge of this court in the matter of **Rajkumar Bajaj alias Raja** (supra), **Subelal** (supra), and by Hon'ble Supreme Court in the matters of **Uday** (supra), and **Deepak Gulati** (supra), this court finds that prosecutrix was free consenting party.

29. Looking to the above mentioned facts and circumstances of the case this court finds that prosecution has failed to prove beyond reasonable doubt the charges punishable u/s 363, 366, 376, IPC. Thus, trial court committed illegality in convicting and sentencing appellant as aforesaid. Hence, the appeal is allowed. This court acquits him of the charges punishable u/s 363, 366, 376, IPC extending benefit of doubt to him.

30. After the expiration of prescribed period of legal remedy available to the party, the fine amount so deposited by the appellant be returned to him.

31. The appellant is on bail. His bail bond stands discharged subject to the provisions contend in Section 437-A of the Cr.P.C.

Sd/-
(**Sharad Kumar Gupta**)
Judge