

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.353 of 2002

Basanta, S/o Bansu, aged about 48 years, R/o Bangala Dafai, Chhoti Bazar,
Police Station Chirmiri, Tahsil Manendragarh, District Korea, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh through Police Station Chirmiri, District Korea,
Chhattisgarh

--- Respondent

For Appellant	:	Shri A.K. Prasad, Advocate
For Respondent	:	Shri Arvind Shukla, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

19.7.2018

1. This appeal is directed against the judgment dated 13.3.2002 passed by the Additional Sessions Judge, Manendragarh, District Korea in Sessions Trial No.388 of 2001 convicting and sentencing the Appellant as under:

Conviction	Sentence
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.1,000/- with default stipulation

2. A charge-sheet for offence punishable under Sections 363, 366 and 376(2)(g) of the Indian Penal Code was filed against the present Appellant and co-accused Harun alleging that on

30.8.2001 at about 8:00 p.m., both of them abducted the prosecutrix (PW1), aged about 14-15 years, from the lawful guardianship of her parents and took her to a distant place and there they committed sexual intercourse with her against her will.

3. In support of its case, the prosecution examined as many as 8 witnesses. Statement of the accused persons were recorded under Section 313 of the Code of Criminal Procedure in which they denied the guilt, pleaded innocence and false implication. No witness has been examined in their defence.
4. After trial, the Trial Court acquitted co-accused Harun of all the charges framed against him, but convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submits that the Appellant has been falsely implicated in the case. He is innocent. On the basis of same set of evidence, co-accused Harun has been acquitted of the charges by the Trial Court. He further submits that from the statements of the prosecutrix and her brothers, it seems that the prosecutrix was a consenting party. At the relevant time, she was more than 16 years of age. She herself had left her house at her own will. Therefore, no offence under Sections 366 and 376 of the Indian Penal Code is proved against the Appellant. Hence, the Appellant 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.

7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. The prosecutrix (PW1) has stated that on the date of incident, in the evening hours, she was at her home. The Appellant took her towards jungle saying that they will roam there. There he committed sexual intercourse with her. Thereafter, he left her at the house of one person. Next day, in the morning, when she was returning towards her home, her brother Sonu (PW3) met her on the way. She told him about the incident. Thereafter, she lodged First Information Report (Ex.P1). She has further stated that her parents have expired. She was residing with her 3 brothers. During cross-examination, in paragraph 7, she has stated that when the Appellant was taking her away, many houses fell on the way and the way was an open way and remained busy for 24 hours. In paragraph 8 of her cross-examination, she has further stated that she does not know the name of the person in whose house the Appellant had left her. She has further stated that one woman was also present in that house, but she had not told about the incident to any of the two persons. She has further stated that next day, her brother met her on the way. She did not tell him about the incident on the way. She told him about the incident after her return to home. In paragraph 9, she has stated that they basically belong to Allahabad (Uttar Pradesh) and her brothers wanted her to send Allahabad, but she did not want to go there.
9. Sonu (PW3), elder brother of the prosecutrix has stated that after

doing his work, he returned home in the evening. He did not find the prosecutrix at home. On being searched, Chingu and Bhupesh told him that they had seen the prosecutrix going along with Appellant Basanta and acquitted accused Harun on a scooter. Thereafter, he lodged a missing report. Next day, he went to the house of Devendra. Wife of Devendra told him that the prosecutrix had come to their house along with Harun and Basanta on a scooter and Harun had taken away the prosecutrix on the said scooter. He has further stated that he came to know from one Kaju that the prosecutrix is in the house of Asha (PW2). He went to the house of Asha. The prosecutrix was found there. On being asked, the prosecutrix told him that Basanta and Harun had taken her to the place where Basanta was doing his duties and they had raped her there.

10. Munnu (PW4), other elder brother of the prosecutrix, has stated that when the prosecutrix was not found, they lodged a missing report. Thereafter, the prosecutrix was found near a well. Later on, the prosecutrix told him that Appellant Basanta had opened her clothes.
11. Dr. Seema Chainpuria (PW7) has stated that she examined the prosecutrix. Her report is Ex.P13 in which she did not find any injury over the body of the prosecutrix. She found the prosecutrix to be habitual to sexual intercourse. She did not find any sign of recent sexual intercourse with the prosecutrix. She referred the prosecutrix to Radiologist for determination of her age.
12. Dr. M.K. Jain (PW6), Radiologist has stated that he examined the

prosecutrix and gave his report Ex.P11. He has opined that radiological age of the prosecutrix was about 15 to 16 years.

- 13.** A minute examination of the above evidence makes it clear that the prosecutrix herself had left her house and gone away along with the Appellant on a scooter. Had the Appellant forcefully taken her away, she would have shouted and screamed. But, she did not do so. From the statement of the prosecutrix, it is also clear that after the alleged sexual intercourse, the Appellant had left her at the house of one person. There, a woman was also present. But, the prosecutrix did not disclose about the incident to any of the two persons. From the statement of the prosecutrix and her conduct, it appears that she was a consenting party.
- 14.** As opined by Radiologist Dr. M.K. Jain (PW6) vide his report (Ex.P11), radiological age of the prosecutrix was 15 to 16 years. The prosecutrix (PW1) and her brothers Sonu (PW3) and Munnu (PW4) have not stated about her date of birth. No Kotwari register or school register/certificate was produced by the prosecution for determination of age of the prosecutrix. Only the radiological report (Ex.P11) is available on record. It is settled law that the age reported vide radiological/ossification test bears +/- 2 years on both sides. It is also settled law that +/- of 2 years is determined in favour of the accused. In these circumstances, on the date of incident, the age of the prosecutrix was above 16 years. Since she was a consenting party and she herself had left her house at her own will, no offence under Sections 366 and 376 of the Indian Penal Code is made out against the Appellant. The Appellant is entitled to get benefit of doubt.

15. 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.
16. 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.
17. 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