

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1197 of 2002****Judgment reserved on : 10/08/2018****Judgment delivered on : 06/10/2018**

- Balak Das S/o Sonadhar Mahra, aged about 24 years, Occupation – Raj Mishtri, R/o Mongrapal Chowki, Bastar, District Jagdalpur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh

---- Respondent

For Appellant. -	Shri Dev Ashish Biswas under the authority of Shri Arun Kochar, Advocates.
For Respondent -	Shri Vaibhav Goverdhan, Panel Lawyer.

Hon'bel Smt. Justice Rajani Dubey**C A V Judgment****06/10/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 24.10.2002 passed by Special Judge (SC/ST Act), Bastar at Jagdalpur, in S.T. No.289/2002 convicting the appellant under Section 363 IPC & sentencing him to undergo R.I. for three years and to pay fine of Rs.1000/- with default stipulation.

02. Brief facts of the case are that on 12.06.2002 FIR (Ex.P/8) was lodged by Ram Singh (PW/5), father of the prosecutrix, alleging in it that on 12.05.2002 the appellant by

alluring the prosecutrix, aged about 15 year, took her along with him on the pretext of marriage. Based on this report, offence under Sections 363, 366 IPC and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act) were registered against the appellant. During investigation, prosecutrix (PW/3) was recovered from the custody of the appellant. According to prosecution, the prosecutrix was subjected to forcible sexual intercourse by the appellant. On 28.06.2002 the prosecutrix was medically examined by Dr. (Smt.) Neela Kumhre (PW/4) vide Ex.P/5 who opined that no definite can be given regarding commission of rape as she is habitual for sexual intercourse, and for age determination, she was referred to radiologist. Ossification test of the prosecutrix was conducted by Dr. Govind Singh (PW/7) who gave his report (Ex.P/13) opining the age of the prosecutrix to be more than 13 year but below 16 year. It is relevant to note here that according to PW/7, there may be three years difference on both sides for age determination. After filling of the charge sheet, the trial Judge framed the charges under Sections 363, 366, 376(1) IPC and 3(1)(xii) of the Act against the appellant.

03. So as to hold the appellant guilty, the prosecution examined as many as 08 witnesses. Statement of the appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. One defence witness Smt. Mankunwar Soni

(DW/1) was also examined to substantiate its case.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record while acquitting the appellant of the charges under Sections 366, 376 (1) IPC and 3(1)(xii) of the Act, has convicted and sentenced the appellant as mentioned in para-1 of this judgment. Hence, this appeal.

05. Learned counsel for the appellant submits as under:

(i) that the appellant has been falsely implicated in the crime in question.

(ii) that the trial Court has erred in law in holding the prosecutrix to be below 18 year on the date of commission of offence. It has been argued that the trial Court has wrongly placed reliance on the entry of Kotwari certificate, which itself has not been proved by the prosecution in accordance with law.

(iii) that the prosecutrix went along with the appellant of her own and lived with him for about a month in a rented premises without offering any protest.

(iv) that there is no legally admissible evidence in respect of age of the prosecutrix and admission register Ex.D/1 does not give conclusive date, thus, merely on the basis of admission register, it cannot be said that on the date of commission of offence she was minor.

(v) that the trial Court believing the statement of DW/1 came to the conclusion that the prosecutrix was minor on the date of commission of offence. It has been argued that DW/1 is

not author of admission register.

(vi) that the medical report Ex.P/5 of the prosecutrix does not support the prosecution case.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the appellant is strictly in accordance law and there is no infirmity in the same.

07. I have heard learned counsel for the parties and perused the material available on record.

08. Smt. Kalawati (PW/1) is the Sarpanch who has proved cast certificate (Ex.P/1) of the prosecutrix. Kanwal Bati (PW/2) – wife of the appellant, turned hostile. Prosecutrix (PW/3) has stated that on the date of incident she was residing in her house along with her parents. The appellant took her along with him to Bhopalpattanam for labour work, thereafter, to his house at Mograpal where he committed forcible sexual intercourse with her. She has further stated that her consent letter (Ex.P/4) was taken by the appellant. In cross-examination, she has stated that while she was being taken to Bhopalpattanam there were huge crowd in the bus stand but she never raised her cries that the appellant was forcibly taking her along with him. In para 6, she admits that she and the appellant stayed in the Bhopalpattanam for two weeks and the appellant used to go for work but she never disclosed this fact to her neighbours that she was being kidnapped by the appellant. She further admits that appellant never bolted the door from outside. She also admits in para 5 that while lodging the report at police station

Bastar she disclosed her age to be 20 year. Dr. (Smt.) Neela Kumhre (PW/4) medically examined the prosecutrix and gave her report (Ex.P/5) opined that no definite opinion can be given regarding rape as the prosecutrix was habitual for sexual intercourse. For age determination, the prosecutrix was referred to radiologist. This witness, in para 2, has stated that the prosecutrix was having 28 teeth. In cross-examination, she has stated that generally a person having 28 teeth comes above 16 years of age. Ram Singh (PW/5) is father of the prosecutrix. He is also the lodger of FIR (Ex.P/8). He has stated that the prosecutrix is from his first wife and 22-25 years have been completed for his marriage with first wife. He has also stated that the prosecutrix born after two years of his marriage. If a general calculation is made from the aforesaid fact, the age of the prosecutrix comes to 20 years. In his entire statement, he has not disclosed the date of birth of the prosecutrix. Dr. Sanjay Basak (PW/6) who medically examined the appellant vide Ex.P/11 has stated that the appellant was capable of performing sexual intercourse. Dr. Govind Singh (PW/7) did ossification test of the prosecutrix and gave his report (Ex.P/12) opining that the prosecutrix could be between 15 to 16 year of age. In cross-examination, he has stated that in age determination difference of three years comes from both side. F.K. Minj (PW/8) – Investigating Officer, has duly supported the prosecution case. Smt. Maankunwar Soni (DW/1), teacher of Govt. Aadim Jati Kalnyan Vibhag Primary School, Parpa, District Bastar, has proved the admission register Ex.D/1 and hand

written certificate thereto vide Ex.D/2 recording the date of birth of prosecutrix as 25.01.1986. She has further stated that the date of birth is being recorded on the basis of disclosure/declaration made by parents of the student but no verification was made with declaration. She admits that sometime there may be difference between declaration and the date of birth recorded in the admission register. She has further stated that the entry in the admission register was not made by her and there could be variation in the same.

09. Close scrutiny of the evidence makes it clear that the prosecutrix accompanied the appellant on 12.05.2002 of her own and lived with him for about one month at Bhopalpattanam and in appellant's house and had sexual intercourse with the appellant without offering any protest there-against. The trial Court itself, after considering the evidence, came to the conclusion that the prosecutrix was a consenting party to the act of the appellant and has acquitted him of the charge under Section 376(1) IPC and 3(1)(xii) of the Act. It is pertinent to mention here that the State has also not preferred any appeal challenging his acquittal under Section 376(1) and 3(1)(xii) of the Act.

10. The only question which arises for consideration by this Court is as to whether the prosecutrix was below 18 year at the time of commission of offence.

11. Though as per the document Ex.D/1 date of birth of the prosecutrix appears to be 25.01.1986, there is no legally

admissible evidence in that regard making the said date of birth acceptable because the entry in the school register was made on the basis of the information given at the time of her admission. Even the father of the prosecutrix has not deposed authentically about her exact date of birth. Merely on the basis of document Ex.D/1 which is an admission register, it cannot be held that she was minor on the date of commission of offence especially when the author of the said document has not been examined by the prosecution nor there is conclusive piece of evidence as to on what basis the date of birth was recorded in the admission register. Even the prosecutrix in her evidence has not uttered about her exact date of birth, went on to state in para 5 of her cross-examination that while lodging the report she had disclosed her age to be 20 year and her father also does not appear to be trustworthy in respect of deposing the age of the prosecutrix. In cross-examination, father of the prosecutrix PW/5 has stated that the prosecutrix is from her first wife, 22-25 years have been completed for his marriage with his first wife and the prosecutrix born after two years from his marriage. In view of the above fact, if general calculation is made, then the age of the prosecutrix comes to 20 years. That apart, the lady Doctor PW/4 who had examined the prosecutrix has stated that the prosecutrix was having 28 teeth and she could be above 16 year of age. Furthermore, though according to Doctor PW/7 who conducted ossification test of the prosecutrix, opined that age of the prosecutrix comes between 13 - 16 year, but in cross-examination, he admits that for age

determination there may be three years difference on both side. It is the bounden duty of the prosecution to prove the fact by leading cogent evidence that the prosecutrix was below the age of 18 year at the time of offence, which they have failed to do so and the trial Court believing the statement of DW/1 came to the conclusion that the prosecutrix was below the age of 18 year.

12. In view of the aforesaid factual discussion and the material available on record, this Court is of the considered opinion that the prosecution has not been able to prove its case beyond reasonable doubt and the trial Court has also fallen in legal error by holding the prosecutrix minor though there is no legally admissible evidence to prove the same. Thus, in these circumstances the appellant has every entitlement to receive the benefit of doubt.

13. Accordingly, the appeal is allowed. Judgment impugned is hereby set aside. The appellant is acquitted of the charge levelled against him. The appellant is reported to be on bail, his bail bonds stand discharged.

Sd/-

(Rajani Dubey)
JUDGE