

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 30-8-2018****Pronounced on 5-9-2018****CRIMINAL APPEAL No. 137/2003**

Santosh S/o. Johan, aged about 20 years, occupation Kumhari, R/o. Village Sambalpur, P.S Bhanupratappur, Distt. Kanker (CG)

-versus-

State of Chhattisgarh, through PS Bhanupratappur, Distt. Kanker (CG)

For appellant : Ms. Aprajita Gayakwad, Adv. on behalf of Smt. Renu Kochar, Advocates.

For State : Shri Vinod Tekam, P.L.

Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

1. In this criminal appeal the challenge is levied to the judgment of conviction and order of sentence dated 10.01.2003 passed by First Additional Sessions Judge, Kanker in ST No. 412/2001 whereby and whereunder he convicted appellant u/s 376 of the Indian Penal Code (hereafter called as 'IPC') and sentenced him to undergo RI for 7 years and fine Rs. 500/-, in default of payment of fine, to further undergo RI for 6 months.
2. In brief the prosecution story is that at the time of the alleged incident prosecutrix was 14 years old and resident of village Sambalpur. On 02.04.2001, she had gone to attend a marriage in the house of one Ramji Halba. At about 09:30 pm appellant caught hold of her, gave threatening to kill and took away her under the tamarind tree beside that house. Thereafter he pressed her mouth and committed forcible sexual intercourse with her. Thereafter, she went to her house and narrated the incident to

her mother, her father, her maternal uncle Tribhuwan Nath, neighbours Hemlal and Mehtar. Due to night she lodged the FIR next day in PS Bhanupratappur. After completion of the investigation a charge-sheet was filed against him u/s 376 and 506, IPC. Trial Court framed charge against him u/s 376 IPC. He abjured the charge and faced trial. To bring home the charge prosecution examined as many as 12 witnesses. Appellant examined one witness in his defence.

3. After conclusion of the trial, Trial Court convicted and sentenced appellant as aforesaid.
4. Counsel for the appellant argued that Trial Court has not appreciated the evidence in proper perspective. Prosecution failed to prove that at the time alleged incident prosecutrix was below 16 years. She was a consenting party. Thus, the conviction and sentence of the appellant are bad in eyes of law. Hence, appellant may be acquitted of the aforesaid charge.
5. Counsel for the State argued that the conviction and sentence of the appellant is based on clinching evidence. The conviction and sentence of the appellant do not call for interference by this Court.
6. P.W. 1 Prosecutrix says in para 4 of her statement given on 3-4-2002 that she is a 5th class passed student. She had left the school two years ago. She failed in class 1st and class 3rd.
7. P.W. 2 Mangesh who is father of the prosecutrix says in para 3 of his statement given on oath on 3-4-2002 that prosecutrix is near about 14 years old.
8. As per photocopy of Dakhil Kharij Panji Shala Ex. P-10 (C), the

date of birth of the prosecutrix is 10-8-1986. As per the certificate Ex. P-11 the date of birth is 10-8-1986. As per Transfer Certificate of the school, the date of birth of the prosecutrix is 10-8-1986.

9. D.W. 1 Gansi Bai says in para 4 of her statement given on oath on 27-9-2002, the prosecutrix is near about 18 – 19 years old.
10. Prosecution has not examined any person who had allegedly stated the date of birth of the prosecutrix as 10-8-1986 at the time of her admission in school to the author of Ex. P-10. Moreover, prosecution failed to examine the author of Ex. P-10. In these circumstances and observations made by Hon'ble Supreme Court in **Biradmal Singhvi v. Anand Purohit** {AIR 1988 SC 1796}, **Bablu Pasi v. State of Jharkhand and Another** {2008 AIR SCW 7332}, **Sunil v. State of Haryana** {2010 (1) SCC 742}, **Alamelu and Another v. State represented by Inspector of Police** {2011 (2) SCC 385}, this Court finds that prosecution does not get any help from Exs. P-10, P-11 and P-23 in this reference that on 2-4-2001 prosecutrix was allegedly below 16 years of age.
11. P.W. 1 prosecutrix, P.W. 2 Mangesh, P.W. 3 Meena Bai who is mother of the prosecutrix, do not say clearly and strongly about the date of birth of the prosecutrix. Moreover, P.W. 3 Meena Bai says in para 4 during her cross-examination that prosecutrix had two elder brothers, eldest is near about 20-21 years old, youngest is two years younger than him. One year after the birth of elder brother the prosecutrix was born.
12. Looking to above mentioned facts and circumstances of the case, this Court disbelieves aforesaid statements of P.W. 1 Prosecutrix

and P.W. 2 Mangesh in this reference that allegedly at the time of the incident, prosecutrix was below 16 years and believes aforesaid statement of D.W. 1 Gansi Bai that at the time of alleged incident the prosecutrix was not below 16 years of age.

13. After appreciation of the evidence discussed herebefore, this Court finds that prosecution has failed to prove beyond reasonable doubt that at the time of alleged incident prosecutrix was below 16 years of age.
14. P.W. 1 prosecutrix says in para 1 that appellant had taken away her forcefully by pulling her from the house of marriage to a nearby tamarind tree and committed sexual intercourse with her.
15. P.W. 2 Mangesh, P.W. 3 Meena Bai and P.W. 6 Hemlal, who is the maternal grand-father of the prosecutrix say in para 1 that prosecutrix had told that the appellant had taken her away near a tamarind tree and committed sexual intercourse with her.
16. P.W. 4 Tribhuwan Ram, who is the maternal uncle of the prosecutrix, P.W. 5 Ruppo Bai and P.W. 7 Mehtar say in para 1 of their statements given on oath that P.W. 3 Meena Bai had told them that the appellant had committed sexual intercourse with the prosecutrix.
17. D.W. 1 Gansi Bai in para 2 of her statement given on oath that prosecutrix had told her that after returning back from the marriage house, her father abused her and asked as to what act she had committed with the appellant, she had also told that she had not committed any wrong act with the appellant.
18. This is not the prosecution case that when allegedly the appellant had taken away the prosecutrix by pulling her from the house of

the marriage, he had shown some dangerous weapon to her. Moreover, P.W. 1 Prosecutrix does not say clearly and strongly that appellant had allegedly given her threatening to kill. Moreover, she says in para 5 and 6 during her cross-examination that at the place of marriage there was crowd, when the appellant had taken away by pulling her, she had not shouted, she had not resisted under the tamarind tree, this is true that she had returned back late night from the house of marriage to her house, then her mother scolded her, after scolding she had narrated the incident to her mother. Moreover, P.W. 2 Mangesh says in para 4 during his cross-examination that when he returned back to his house he found that prosecutrix was not sleeping in his house instead of it, she was sleeping in the house of her paternal aunt, when he inquired with her then she told him about the incident, P.W. 5 Ruppo Bai says in para 1 of her statement given on oath that she had seen that prosecutrix was sleeping in courtyard of Ramji Halba. Moreover P.W. 3 Meena Bai says in para 1 during her examination in chief that the prosecutrix had told that she had gone to pass urine under the tamarind tree, this is not the prosecution case. Moreover, P.W. 2 Mangesh and P.W. 3 Meena Bai, do not say clearly and strongly that the appellant had taken away prosecutrix forcefully. In these circumstances, there is strong possibility that prosecutrix was allegedly 'consenting party'.

19. P.W. 4 Tribhuwan Ram, P.W. 5 Ruppo Bai and P.W. 7 Mehtar do not say clearly and strongly that prosecutrix herself narrated the incident to them. This circumstance is not normal and natural.

20. There is no such evidence on record on the strength of which it can be said that aforesaid statement of D.W. 1 Gansi Bai is not believable in this reference that allegedly the appellant had not committed rape with the prosecutrix.
21. After appreciation of the evidence discussed herebefore this Court disbelieves aforesaid statements of Para 1 of the prosecutrix, P.W. 2 Mangesh, P.W. 3 Meena Bai, P.W. 4 Tribhuwan, P.W. 5 Rupo Bai, P.W. 6 Hemlal, P.W. 7 Mehtar, in this reference that the appellant had allegedly committed rape with prosecutrix and believes on the aforesaid statement of Para 2 of D.W. 1 Gansi Bai in this reference that allegedly appellant had not committed rape with the prosecutrix.
22. Looking to the above mentioned facts and circumstances of the case, this court finds that the prosecution has failed to prove beyond reasonable doubt the charge punishable under Section 376 of the IPC against the appellant.
23. Consequently, the appeal is allowed. The impugned judgment of conviction and order of sentence are set aside. The appellant is acquitted of the charge punishable under section 376 of the IPC extending him benefit of doubt. After the prescribed period of appeal or revision, the fine amount, if deposited, be refunded to the appellant.
24. The appellant is reported to be on bail. His bail bonds stands cancelled subject to the provisions of Section 437-A, Cr.P.C.

Sd/-
(Sharad Kumar Gupta)
Judge