

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRIMINAL APPEAL No 879/2007****Reserved on 21-8-2018****Delivered on 24-8-2018**

(Arising out of the judgment of conviction and order of sentence dated 16-8-2006 passed by the Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in ST No. 348/2006)

Lakhamu alias Kadi, S/o. Mangtu Rawat, aged about 21 years, occupation Carpenter, R/o. Village Dhaniyaloor, PS Parpa, Distt. Bastar at Jagdalpur

Versus

State of Chhattisgarh through PS AJAK, Jagdalpur, Distt. Bastar

 For Appellant : Shri K.K. Dewangan, Adv.
 For Respondent : Shri Vinod Tekam, Panel Lawyer.

Hon'ble Shri Justice Sharad Kumar Gupta**CAV JUDGMENT**

1. In this criminal appeal challenge levied is to the judgment of conviction and order of sentence dated 16-8-2007 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bastar at Jagdalpur in ST No. 348/2006 whereby and whereunder he convicted the appellant for offence punishable under Sections 363 and 366 of the Indian Penal Code (in brevity 'IPC') and sentenced him only under Section 366, IPC to undergo RI for four years and to pay a fine Rs. 2,000/-, in default of payment of fine, to further undergo

additional RI for three months.

2. In brief the prosecution case is that the prosecutrix was about 14-15 years old on 25-7-2006 and resident of village Dhaniyaloor. She is a member of scheduled tribe and the appellant is a member of general category. On 25-7-2006, the appellant kidnapped the prosecutrix promising that he shall marry her. He took her away to different places. He was committing sexual intercourse with her on the pretext of marriage. After some times the prosecutrix returned back to her house and lodged report against the appellant. After completion of the investigation a charge sheet was filed against the appellant u/s 363, 366, 376, IPC and Section 3(1)(xii), 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter called as 'Act, 1989'). The trial Court framed the charges against the appellant under Sections 363, 366 and 376 of the IPC, alternatively, S. 3(1)(xii) of the Act, 1989. Appellant abjured the charges and faced trial. To bring home the charges prosecution examined as many as 11 witnesses. Appellant did not examine any witness in his defence. After completion of trial the trial Court acquitted the appellant from the charge punishable under Section 3(1)(xii) of the Act, 1989 and Section 376, IPC however convicted and sentenced him as aforesaid.
3. P.W. 4 prosecutrix says in para 1 of her statement given on oath on 18.04.2007 that her age is about 14 years.

4. As per the District Level Primary Certificate Examination, 2005 Bastar District, Jagdalpur, Chhattisgarh the date of birth of the prosecutrix is 17.06.1994.
5. As per the alleged report of Radiologist Ex. P-5, P.W. 2 Dr. Govind Singh opined that age of the prosecutrix was above 12 years but below 15 years.
6. P.W. 5 Budhram @ Ghenu says in para 2 that he had admitted prosecutrix in school, but he does not say that at the time of the admission allegedly he had told that the date of birth of the prosecutrix is 17.06.1994. Instead of it he says in para 5 during his cross-examination that he cannot say as to how and on what basis the teacher has written the age of the prosecutrix. Moreover, prosecution has failed to examine the concerned school official who had recorded the aforesaid date of birth of the prosecutrix at the time of her admission. Looking to 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 Ex. P-4 in this reference that on 25.07.2006 prosecutrix was allegedly below 18 years of age.
7. As per the entry of Sl. No. 3 of Ex. P-5, Epiphysis of head of humerus fusion 14 – 16 years seen fused. P.W. 2 Dr. Govind

Singh says in para 5 during his cross examination that if the age of the prosecutrix is assessed on the basis of entry of Sl. No. 3 of Ex. P-5 then age of prosecutrix may be above 16 years.

8. In **Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir and Others (AIR 1982 SC 1297)** Hon'ble Supreme Court has observed that margin of error in age ascertained by radiological examination is two years on both side.

9. Looking to the observation made by Hon'ble Supreme Court in **Jayamala (supra)** this Court finds that as per the entry of Sl. No. 3 of Ex. P-5, the age of the prosecutrix could have been above 18 years on 25.07.2006.

10. P.W. 4 prosecutrix says in paras 1, 6, 7 and 9 that she is a student of Class- 7, her father had expired 10-12 years ago, at that time her age was 6-7 years. After the death of her father she had come in the house of her elder paternal uncle, at that time she was 8-9 years old. She studied in Angan Badi for 8-9 years. P.W. 5 Budhram @ Ghenu says in para 2 that he does not know the age of the prosecutrix. P.W. 9 Subhadra who is the mother of the prosecutrix says in paras 1 and 3 of her statement given on oath that she does not know the age of the prosecutrix.

11. Looking to the above mentioned facts and circumstances, this Court disbelieves the aforesaid statement of para 1 of prosecutrix.

12. After the appreciation of the evidence discussed herebefore this Court finds that prosecution has failed to prove

beyond reasonable doubt that on 25.07.2006 the prosecutrix was below 18 years of age.

13. The Trial Court had already given the finding that prosecutrix was a 'consensual party'.

14. 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 IPC against the appellant.

15. After the appreciation of the evidence discussed herebefore this Court sets aside the aforesaid sentence and conviction of the appellant and acquit him from the charges punishable u/s 363 and 366, IPC extending him benefit of doubt. The fine if deposited by appellant, be returned to him after the prescribed period of appeal/revision.

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

Sd/-
(Sharad Kumar Gupta)
Judge