

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 24-10-2018****Delivered on 15-11-2018****CRIMINAL APPEAL No. 544/2001**

(Arising out of judgment of conviction and order of sentence dated 19-5-2001 passed by the 2nd Additional Sessions Judge, Baloda Bajar, Distt. Raipur CG in ST No. 89/2000)

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Reshamlal Satnami, aged about 19 years, S/o. Mehtar Satnami, R/o. Village Maghal, P.S. Sarsinwa Distt. Raipur (CG) ----**Appellant**

-Versus-

State of Chhattisgarh through P.S. Sersinwa, Distt. Raipur (CG) ----**Respondent**

For appellant : Ms. Shivali Dubey, Adv.
For State : Mr. Ramakant Pandey, PL.

Hon'ble Shri Sharad Kumar Gupta, Judge
CAV JUDGMENT

1. In this criminal appeal the challenge levied is to the judgment of conviction and order of sentence dated 19-5-2001 passed by the 2nd Additional Sessions Judge, Baloda Bajar, Distt. Raipur CG in ST No. 89/2000 whereby and whereunder he convicted and sentenced the appellants as under:-

Section	Sentence	Fine with Default
363, IPC	RI for 3 years	Rs. 300/-, in default of fine RI for 3 months
366, IPC	RI for 3 years	Rs. 200/-, in default of fine RI for 2 months

Both the jail sentences are directed to run concurrently.

2. In brief, case of the prosecution is that on 2-11-1999 prosecutrix was about 15 years old. She is a resident of village Maghaibhatha. On 2-11-1999 mother of the prosecutrix had gone to paddy cutting on wages. The prosecutrix was present in the house. The appellant

reached in the house and told that her mother has got injured by sickle and she called her. He took her on bicycle in another direction. He threatened her to kill by knife. He took her in the house of Narmada Bai. He committed sexual intercourse with her. Co-accused Lakhanlal had wrongly concealed her. Co-accused Lakhanlal and Bihari Sahu left her near the house of her maternal uncle at village Jogidipa. On 6-11-1999 she lodged a report in PS Sarsiva. After completing the investigation a charge sheet was filed against appellants. Trial Court framed charges against the appellant under Sections 366, 366, 376(1), 506-B of the Indian Penal Code (in brevity 'IPC') and against co-accused Lakhanlal Sahu under Section 368, IPC.

3. After conclusion of the trial, Trial Court acquitted co-accused Lakhanlal Sahu of the aforesaid charge. Trial Court acquitted the appellant from the charges punishable under Section 376(1), 506-B, IPC, however convicted and sentenced him as aforesaid.

4. Hence this appeal.

5. Ms. Shivali Dubey, counsel for the appellant strenuously argued that trial Court has not appreciated the evidence in its proper perspective. 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.

6. Shri Ramakant Pandey, 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.

7. P.W. 3 Asharam and P.W. 4 Johitram say in para 1 of their statements given on oath that at the time of the incident prosecutrix was 15 years old.

8. As per Ex. P-2 one birth-death Kotwari register was seized wherein the date of birth of the prosecutrix was mentioned as 15-9-1983.

9. 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....”

10. 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.”

11. 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.”

12. 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.”

13. P.W. 8 Bachcharam who is father of the prosecutrix says in para 1 of his statement given on oath that he had got written date of birth of the prosecutrix in Kotwari panji, after 2 years of birth of prosecutrix.

14. As per the note P.W. 9 Smt. Gangabai who is mother of the prosecutrix had stated that 2 years after the birth of the prosecutrix her date of birth got written in Kotwari register. She says in para 10 during her cross-examination that prosecutrix is about 19-20 years old. (date of statement is 11-5-2001).

15. In the case in hand prosecution has failed to prove aforesaid original register, regarding said entry. The prosecution failed to give any explanation as to why it was not done.

16. Looking to the aforesaid facts and circumstances of the case, judicial precedents laid down by Hon”ble Supreme court **Birad Mal Singhvi** (Surpa), **Babloo Pasi** (Supra), **Sunil** (Supra), **Alamelu** (Supra) this court disbelieves aforesaid statements of para 1 of P.W. 3 Asharam, P.W. 4 Johitram, Ex. P-2 in the reference that on 2-11-1999, prosecutrix was below 18 years of age.

17. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that on 2-11-1999 the age of prosecutrix was below 18 years.

18. P.W. 7 Chheduram, P.W. 12 Nonibai say in para 1 of their statements given on oath that appellant had come along with the prosecutrix in their house.

19. P.W. 5 prosecutrix says in para 1 of her statement that nothing happened with her. She, P.W. 8 Bachcharam, P.W. 9 Smt. Gangabai do not support the prosecution case pertaining to charges punishable under Section 363, 366, IPC. P.W. 8 Bachcharam says in para 9 during his cross-examination that this is true that prosecutrix had gone to her maternal uncle's house on account of quarrel. P.W. 10 Smt Shyambai, P.W. 11 Nandlal who are the maternal aunt and uncle say in para 1 of their statements given on oath that prosecutrix had come in their house alone and stated that quarrel happened with her mother.

20. Looking to the above facts and circumstances of the case, this Court finds that prosecution does not get any help from the aforesaid statements of para 1 of P.W. 10 Smt. Shyambai, P.W. 11 Nandlal to fasten the appellant in the offences punishable under Section 363, 366, IPC.

21. After the appreciation of the evidence discussed herebefore, this Court finds that prosecution has failed to prove beyond reasonable doubt charges punishable under Section 363, 366, IPC against the appellant. Thus, this Court finds that trial Court had committed illegality in convicting and sentencing the appellant of the offences punishable under Section 363, 366, IPC. Hence, the appeal is allowed and the

impugned judgment of the conviction and order of sentences are set aside.

22. The appellant is in jail. He be set at liberty forthwith if he is not required in any other criminal case.

23. The fine amount if deposited by the appellant be returned to him after expiry of the prescribed period for further legal action available to parties.

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