

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.126 of 2009**

Santosh Nayak aged about 23 years, S/o. Hari Nayak, R/o. RVH Colony, Police Line Raipur.

---- Appellant

Versus

The State Of Chhattisgarh, through Police Station Shivrinarayan, Distt. Janjgir Champa (CG)

---- Respondent

 For the appellant : Shri Parag Kotecha, Advocate
 For the respondent/State : Shri Vinod Tekam, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****22.10.2018.**

1. This appeal is directed against the judgment of conviction and order of sentence dated 29.01.2009 passed by Additional Sessions Judge, Janjgir, Distt. Janjgir Champa (CG) in Session Trial No.205/2008 wherein the said Court convicted the appellant for commission of offence under Sections 363 and 366 of the Indian Penal Code and sentenced to undergo Rigorous imprisonment for seven years and to pay fine of Rs.1000/- and RI for 7 years and to pay fine of Rs.1000/- with default stipulation.
2. As per the prosecution case, the appellant after alluring the prosecutrix took away her from lawful guardianship on 02.3.2008 at about 7.00 am.
3. The trial Court after evaluating the evidence opined that physical relation maintained by both the sides was by the consent

of the prosecutrix therefore, the offence under Section 376(1) is not established. For commission of offence under Section 363 IPC date of birth of the prosecutrix has to be proved that on the date of offence she was under the age of 18 years and was under the custody of lawful guardianship. In the present case, Savitri Patre (PW-3) is the mother of the prosecutrix but she did not depose the date of birth of the prosecutrix. Rajkumar Patre (PW-4) is the father of the prosecutrix and he also did not depose the date of birth of the prosecutrix. Narendra Kumar Kurre (PW-5) is a Principal of Maruti Nandan Higher Secondary School, Mehandi who produced the school register and stated before the trial Court that in the school register date of the prosecutrix is mentioned as 10.5.1990. But in his cross-examination he admitted that prosecutrix did not complete her primary education from his school. It is also not clear as to who really admitted the prosecutrix and who recorded the date of birth the prosecutrix. No birth certificate was produced and no medical examination was done to ascertain the age of the prosecutrix. In absence of birth certificate or any other certificate which may be the foundation of the date of birth it is not proved that on the date of incident i.e. on 02.3.2008 the prosecutrix was 18 years of the age. In absence of proof of age, kidnapping from the lawful guardianship is not established and offence under Section 363 IPC is not made out against the appellant.

4. The trial Court after assessing the evidence, opined that the physical relation ship maintained by the parties was out of consent

and therefore, it cannot be said that the prosecutrix was compelled for illicit intercourse. From the evidence of the prosecutrix it is established that when she was with the appellant in various places no complaint was made by her during the course of her stay with him and therefore, it is not a case of kidnapping or abducting the prosecutrix to compel her to illicit intercourse, therefore, offence under Section 366 is also not established.

5. Consequently, the appeal is allowed. Conviction and sentence passed by the trial Court is set aside. The appellant is acquitted of the charges under Section 363 & 366 IPC. The appellant is reported to be on bail. His bail bonds shall remain operative for a further period of six months from today in terms of Section 437A of the CrPC.

Sd/-
(Ram Prasanna Sharma)
JUDGE