

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 674 of 2014**

- Ramkumar S/o Shri Mohan Baiga Aged About 22 Years R/o. Village Aamadob, P.S. Gaurela, Revenue And Civil District Bilaspur Chhattisgarh

---- Appellant**Versus**

- State of Chhattisgarh Through Police Station Gaurela, Distt. Bilaspur C.G.

---- Respondent

For Appellant	:	Shri Palash Tiwari, Advocate
For Respondent-State	:	Shri Anil Pillai, Dy. AG for the State

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****05/05/2018**

1. Heard.
2. This appeal has been preferred against the judgment of conviction and order of sentence passed by learned Special Additional Sessions Judge, (FTC), District Bilaspur in Special Sessions Trial No.45/2013 dated 15.04.2014, whereby the appellant has been convicted under Sections 363 & 366 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo R.I. for 3 years, R.I. for 3 years and R.I. for 10 years and to pay fine of Rs.3000/-, Rs.3000/- & Rs.10,000/-, respectively, and in absence of payment of fine amount additional S.I. for 6 months was also ordered.
3. As per the prosecution case, on 06.06.2013 at about 4 AM, the daughter of the complainant namely Ganesh Prasad, the victim who is a minor, all of a sudden was found missing from the house. Having enquired, initially no trace was found out. Thereafter, on enquiry it revealed that the appellant namely Ramkumar enticed away the minor girl and has kept her in the

unknown place. Subsequently, when the appellant was found, he stated that he will not leave the daughter of the complainant and when the complainant met with the father of the appellant, he stated that his son i.e. the appellant herein likes his daughter, thereafter the report was made to the police and when the Police came the victim was found in the possession of the appellant. After the report, the prosecutrix was subjected to medical check up and having found that, she had suffered sexual assault, after recording the statement of the witnesses charge-sheet was filed under Sections 363, 366 & 376 of the IPC. At the time of framing of charge prima facie documents were placed that the victim was minor, subsequently, the charges were framed under Sections 363, 366 & 376 (2) IPC and Sections 6 & 4 of the POCSO Act, 2012. The father of the appellant was also one of the accused and against him charges were framed under Section 368 IPC. The trial Court after evaluating the evidence convicted both the son i.e. the appellant herein and the father of the appellant namely Mohan Baiga and no appeal has been preferred by the father-Mohan Baiga.

4. Learned counsel for the appellant submits that the prosecution in this case has failed to prove the age of the prosecutrix beyond reasonable doubt. He further submits that the conduct of the prosecutrix would show that she at about 4 AM went out of the house to answer the call of the nature, she met the appellant and eloped with him. He further submits that the statement of Ganesh Prasad (PW-2) would show that on the date of incident, his daughter was major, therefore, no case is actually made out against the appellant and he is liable to be acquitted.
5. Per contra, learned State counsel opposes the arguments advanced by learned counsel for the appellant and submits that the order of the Court below is well merited which do not call for any interference.
6. I have heard learned counsel for the parties and perused the documents.

7. The date of incident in this case was of 06.06.2013 and the age which is defined under Section 2 (D) of the POCSO Act, prescribed that it should be below 18 years to attract the offence of the POCSO Act, 2012. To prove the age of the prosecutrix, the prosecution has relied upon the statement of the father of the prosecutrix Ganesh Prasad (PW-2). The Principal of the School, wherein the prosecutrix was studying i.e. Kailash Bihari Agrawal (PW-5), who has proved the admission register, which is marked as Ex. P-11A, wherein the date of birth of the victim is recorded as 15.07.1997 at the time of admission. The father Ganesh Prasad (PW-2) has stated that the date of birth of the prosecutrix was 5th of July, 1997. The statement would show that he has stated that he has three children and could not tell the date of birth of the other children except the victim. At the same time father Ganesh Prasad (PW-2), who was examined on 16.12.2013 would show that his age was shown and written as 49 years. If such age is evaluated with the statement wherein he has deposed that his marriage had taken place at the age of 17 – 18 years and after 1 – 1 ½ years of marriage, first child was born and two years gap was occurred in between each child approximately. So when the statement of the father is evaluated with his age shown in the deposition and going back to the date of marriage which is said to be solemnized about 17 – 18 years approximately, it reflects that on the date of deposition 30 years might have passed after the marriage as the marriage is stated to be in between 17 – 18 years of age and even if two years gap is taken in each child after birth of the first child approximately, it shows that 24 years may have passed after the last child was born i.e. the victim. Ganesh Prasad (PW-2) has deposed that he has not recorded the date of birth of any child in the Kotwari Register.
8. Kailash Bihari Agrawa (PW-5), the Principal of the School wherein the victim was studying though has proved the register wherein the date of birth of the victim is shown to be written as 15.07.1997, it is stated that he has not recorded the same. Meaning thereby he is not the author of the same.

9. Ganesh Prasad (PW-2) has created ambiguity and doubt about the date of birth, has also not stated that he has recorded the date of birth at the time of admission. Therefore, has has been held in case of ***Birad Mal Singhvi v. Anand Purohit*** reported in ***AIR 1988 SC 1796*** the Supreme Court in para 24 has held as under :

“24.....The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date or birth of the person concerned. 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 someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.”

10. The evidence as on record shows that the prosecution was not able to substantiate the actual date of birth of the victim. So the doubts have been created in respect of the actual date of birth as to whether the victim was minor on the date of incident or not? In a result, benefit of doubt has to lean in favour of the appellant.
11. Statement of the victim PW-1 would show that when the deposition was recorded in the year 2013 in the month of December and she has stated her age as 17 years. Thus, there is no definite evidence in respect of the age. The Supreme Court in the case of ***Sunil V. State of Haryana {(2010) 1 CCSC 258 (SC)}*** has stated that the conviction cannot be based on approximate date, which is not supported by any record. In this case, the statement of the father is doubtful as also the Principal, who has recorded the date of birth, has not been examined. The prosecutrix has stated that her age is 17 years, which is also on the basis of approximate date. Therefore, benefit has to lean in favour of the appellant/accused to hold that the prosecution has failed to prove that on the date of incident the victim was a minor. Reading of the statement of the victim PW-1 would show that

she has stated that she went out at about 4 AM to answer the call of nature and met the appellant, thereafter, the appellant allured and took her away. It also creates a doubt that whether the incident as narrated that the appellant met the prosecutrix at about 4 AM on a particular date, until & unless the prior information is given, how the appellant would have come to know that she will come out at 4 AM in the morning and thereafter the appellant allured and will take her away against her will. The statement of the prosecutrix shows that she remained in the company of the appellant for a considerable time and moved to different places and lastly ended up in a school, wherein in a room she was kept.

12. Therefore, taking into the totality of the facts, I am of the opinion that the prosecution has primarily failed to prove the fact that on the date of incident, the victim was a minor and further taking into the statement of the prosecutrix PW1, it would show that she was a consenting party and was in the company of the appellant. Considering the same, I am inclined to allow the appeal.

13. In a result, the conviction made by the learned Court below cannot be sustained and it is accordingly set aside. The appellant is acquitted of the charges leveled against him. The appellant is in jail since 09.06.2013 and almost 5 years have passed, he is directed to be released forthwith if not required in any other case.

14. Accordingly, the appeal is allowed.

SD/-

Goutam Bhaduri
Judge

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