

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 154 of 2014**

Dharam Singh, S/o. Shri Hari by Caste Dhakad, Aged About 60 Years, By caste Dhakad, Occupation Labour, R/o. Gurugovind Singh, Ward No.36, Near Bhairam Dev Mandir Jagdalpur, P.S. Bodhghat, Distt. Bastar, Civil & Revenue District Bastar (C.G.)

---- Appellant

Versus

State Of Chhattisgarh, Through Station House Officer, Police Station Ajak Jagdalpur, District Bastar (C.G.)

---- Respondent

For Appellant : Shri Rajnish Shrivastava, Advocate.

For State : Shri Sangarsh Pandey, Dy.Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri**Judgment on Board**

07/08/2018

Heard.

1. Instant appeal is against the judgment dated 13th December, 2013 passed by the Sessions Judge (Atrocity) Bastar at Jagdalpur in Sessions Case No.35/2013 whereby the appellant has been convicted under section 376(1) of IPC and under section 3(2)(V) of SC/ST Prevention of Atrocities Act and he has been sentenced R.I. for 7 years and fine of Rs.1000/- and R.I. for 1 year and fine of Rs.1000/- respectively, in default of payment of fine amount further R.I. for 6-6 months has been ordered.

2. As per the prosecution case, the accused/appellant and the prosecutrix her mother Nilabati and sister Urmila they belong to Schedule Tribe and were living alongwith the appellant in their house for last 9-10 years. On 27/10/2012 the mother of the prosecutrix went to village Lohandiguda and wife of the appellant went to Dantewada, therefore, on 30/10/2012 in the house appellant/accused was alone with the prosecutrix

and her sister. At about 9 p.m. the prosecutrix was watching TV in the house of the accused, sister of the prosecutrix had slept, at that time, the accused caught hold of the prosecutrix dragged her to different room and told her that after marriage what happens he will show her. Subsequently, the accused took out the garments of the prosecutrix and despite her resistance committed forceful sexual intercourse. The prosecutrix when raised alarm her neighbour Shyambati came there, thereafter it was told the accused who is maternal uncle has committed wrong with her and hearing so neighbour took the prosecutrix away along-with her sister gave them shelter for the night and when on the next day her mother came held meeting with them and eventually report was made on 01/11/2012 by Ex.P-9. Subsequently, the statement of the prosecutrix and the other witnesses were recorded and age of the prosecutrix was also affirmed by the Radiologist and with respect to caste, certificate was also seized and thereafter after recording statements charge sheet was filed against the appellant and since victim belong to Schedule Tribe, as such, offence under Section 376 of I.P.C. alongwith 3(1) (xii) of Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act was filed against the appellant. After committal of the case to the Special Judge charges were framed against the appellant under Section 376 of I.P.C. and Section 3 (2) (V) of the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act.

3. During the course of trial, the appellant abjured his guilt and claimed to be tried and the prosecution on their behalf had examined 14 witnesses. The trial Court after evaluating all the facts and evidence found offence to be proved and convicted the appellant as aforesaid; hence this appeal.

4. Learned counsel for the appellant would submit that the appellant has been falsely implicated in this case and neighbours have not supported the case. It is further contended that the age of the prosecutrix is also not proved and she was consenting party as she was a major. He further submits that all

the seizure witnesses have turned hostile, therefore, the prosecution has failed to prove the case beyond reasonable doubt, as such, the judgment of conviction may be set aside.

5. Per contra, learned State counsel opposes the argument and would submit that order of the court below is well merited which do not require any interference.

6. Perused the record of the court below. In order to prove the age of the prosecutrix the prosecution has relied on the mark sheet Ex.P-7A. The said seizure was made by Ex.P-7. The same is proved by the prosecutrix PW-7. Ex.P-7(A) is a mark sheet wherein the date of birth of the prosecutrix is shown as 07.10.1998 and how such date was written is not clear. Certainly, it is the prosecutrix who have recorded her date. She stated in her deposition that at the relevant time, she was reading in Class-9th and her age was 14-15 years. PW-2, Ambika Baghel, Teacher, had stated age of the prosecutrix was 14-15 years and what is source of such knowledge has not been proved. The mother of the prosecutrix PW-8, Smt. Neelabati, has stated the age of her daughter is 16 years.

7. The Supreme Court in the case of like nature in the case of ***Alamelu & Another v. State represented by Inspector of Police*** reported in ***(2011) 2 SCC 385*** has held as under:

“42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit (1988 Supp SCC 604)*, observed as follows: (SCC pp. 618-19, para 14)

“14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exts. 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 Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of the date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Jaiswal* [(2003) 8 SCC 745], where this Court observed as follows: (SCC P.751 para 16)

"16.....The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

Therefore, by mere marking the document as an article, the contents cannot be automatically held to be proved.

8. Further, in case of ***Birad Mal Singhvi v. Anand Purohit*** reported in ***AIR 1988 SC 1796***, the Supreme Court has observed in Para 24 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 of 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.

9. Considering the documents and the statements. Ex.P-7 cannot be accepted as a gospel truth as it itself has been contradicted by the mother of the prosecutrix where she stated that the age of her daughter is 16 years.

10. Now further referring to the statement of the Doctor Smt. Sarita Mahobia, PW-4, she stated that she had examined the prosecutrix who was 14 years and since she had a denture of 28 number, it was advised for the X-ray. The T.I. PW-10, Shankar Lal Sahu, had stated that he took the prosecutrix for the X-ray to confirm the radiological age and the X-ray report was obtained which is marked as Ex.P-16 which record that radiological bony age was shown to 13-16 years.

11. So far as, the radiological report is concerned, in Modi's Jurisprudence (20th Edn.), it is stated that too much reliance should not be placed on the table showing the age and years of appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the

some province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be upto 3 years on either side. Relying on the said analogy, this Court in ***Tirithram v. State of M.P. (Now C.G.)*** reported in **2012 (2) C.G.L.J. 1** held thus in Para 7 :

“.....The Radiologist has found that the prosecutrix was aged about 16 years on the date of incident. If we add 3 years to the said finding of 16 years recorded by the radiologist the age of the prosecutrix would come to 19 years. In fact, except the above Radiologist report, there is no reliable evidence regarding age of the prosecutrix. I am of the opinion that in the above facts and circumstances, the learned Sessions Judge has wrongly held that the prosecutrix was minor on the date of incident and the above finding cannot be sustained.”

12. Applying the aforesaid principles in this case, the mother PW-8 in her statement has deposed that the age of the prosecutrix was 16 years, the author of the mark sheet was not examined and the X-ray report Ex.P-16 which is proved by Dr. PW-12 had stated that the age of the prosecutrix was above 13 years but below 16 years; therefore, considering the benefit of margin of 3 years, it can be presumed that the prosecution has failed to prove the age of the prosecutrix that she was below age of 16 years on the date of incident. Further, the incident was of the year 2012, Section 375 of I.P.C. which was amended w.e.f. 03.02.2013 prior to the substitution was as under :

375. Rape. - A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.	xxx	xxx	xxx
Secondly.	xxx	xxx	xxx
Thirdly	xxx	xxx	xxx
Fourthly	xxx	xxx	xxx

fifthly xxx xxx xxx

Sixthly. -With or without her consent, when she is under sixteen years of age.

13. In the totality, it appears that the prosecution has failed to prove the fact that the prosecutrix was below the age of 16 years, the benefit of doubt certainly should lean in favour of the accused. Accordingly, it is held that the prosecution was failed to prove that the prosecutrix was minor on the date of incident.

14. Now reverting back to the statement of the prosecutrix PW-7, she has stated that while she was alone, she was taken to different room by the appellant, thereafter, her garments were opened and she was subjected to forceful rape. The statement would show that when the rape was committed her sister, aged about 11 years, was also in the house. The map of the place of incident is proved as Ex.P-17 wherein it shows that all the rooms were adjacent to each other in the compact vicinity. The Doctor PW-4 had stated that on inspection, she found that no injury was present on the private part of the prosecutrix and immediate opinion of rape would not have been given. The report was given by Ex.P-4.

15. Therefore, reading the statement of the prosecutrix doubts are created as to very happening of the incident. The statement of the prosecutrix, PW-7, suffers from serious infirmities as while she was being taken to the another room how she did not cry for help. She also stated that she was made to lie on the cot till then also she did not object and subsequently after commission of rape when the appellant went away she did not report to anyone.

16. Under the circumstances, serious doubt has been created as to happening of the incident. Consequently, I am of the opinion that when the age of the prosecutrix itself was not proved that she was minor beyond the reasonable doubt, the benefit of doubt should lean in favour of the appellant.

17. In a result, the judgment of conviction and order of sentence dated 13.12.2013 is set aside. Consequently, the appeal is allowed. The appellant is acquitted of the charges leveled against him. The appellant is in jail since 07.01.2013 and suffered more than five years & seven months, therefore, he be released forthwith, if his custody is not required in any other case.

Sd/-
(Goutam Bhaduri)
JUDGE