

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CR.A. No. 594 of 2015

Kailash Viswakarma, S/o. Kejuram Viswakarma, Aged About 24 Years, R/o. Village Onkari, Thana Charama, Revenue/civil Distt. Kanker Chhattisgarh.

----- Appellant

Versus

State Of Chhattisgarh, S/o. Through Police Station Arjuni, Distt. Dhamtari Chhattisgarh.

-----Respondent

For Appellant	: Mr. Samir Singh, Advocate
For Respondent/State	: Mr. Anant Bajpai, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order On Board

25/10/2018

1. This appeal has been preferred against the judgment of conviction and order of sentence, passed by the Special Judge (ST/SC Act) District – Dhamtari (C.G.), in Special Sessions Case No.11/2014 on 24.01.2015, convicting the appellant for the offence under Section 363, 366 of the Indian Penal Code and Section 4 of Protection of Children from Sexual Offence Act and sentencing him to under go R.I. for 7 year and fine of Rs.100/-, R.I. for 7 year and fine of Rs.100/- and R.I. for 7 year and fine of Rs.100/- respectively with default stipulations.
2. The case of the prosecution is this that the prosecutrix aged about 16 years went missing on 29.11.2013. A missing report was lodged. Subsequent to which, FIR was lodged on 12.01.2014. The prosecutrix was recovered from the custody of this appellant

on 01.06.2014 vide recovery memo Ex.P-9. Subsequent to that on the basis of statement given by her, offences were registered against the appellant. Investigation was completed and the charge-sheet was filed before the concerned Court.

3. Appellant was charged with offence under Section 363, 366 of the Indian Penal Code and Section 4 of Protection of Children from Sexual Offences Act and Section 3 (1) (12) of the S.T.& S.T. (Prevention of Atrocity) Act. The appellant denied the charges and prayed for trial. The prosecution examined as many as 12 witnesses on its behalf. On examining the appellant under Section 313, he denied all the incriminating evidence against him and pleaded innocence and false implication. No witness was examined in defence. On completion of trial, judgment has been delivered, in which the appellant stands convicted and sentenced as mentioned aforesaid.
4. It is submitted by the learned counsel appearing on behalf of the appellant that the trial Court has passed totally erroneous judgment of conviction without there being any basis of reliable and cogent evidence in support of the charge. The prosecutrix herself has made such admission in her cross-examination, which go to show that she was a consenting party. The age of the prosecutrix has not been duly proved by the prosecution as the author of the entry made in the school register has not been examined regarding which reliance is place on the judgment of

this Court in case of ***Subelal Vs. State of M.P. (Now C.G.)***¹, hence, the prosecutrix was not a minor on the date of incident and there is evidence that she was a consenting party, therefore, the conviction is bad-in-law. Therefore, it is prayed that the appellant be acquitted of the charges.

5. Counsel for the State opposes the grounds raised in appeal and the submissions made in this respect. It is submitted that the prosecution has proved its case beyond all reasonable doubts. The prosecutrix has given clear and categorical statement against the appellant and the proof that she was a minor is also present on record. Hence there is no room for interference in the impugned judgment, hence, the appeal be dismissed.
6. I have heard the learned counsel for the parties and perused the record of the Court below.
7. The point in issue in this appeal is whether the prosecution has proved the charges against the appellant on the basis of the evidence beyond reasonable doubt?
8. The prosecutrix (P.W.-5) has stated in her examination-in-chief that on the date of incident, the appellant allured her with false promise to marry her, because of which, she eloped with him. Both of them stayed in Bhanupratapur in rented house, wherein, the appellant committed the offence of rape with her. Subsequently, she was recovered from the custody of the

¹ 2011 (4) C.G.L.J. 424

appellant by the police. In cross-examination, she has admitted that she was working as labour with the appellant in her village, where the appellant used to work as Mason. When the construction work was completed in village – Malgaon, the appellant proposed to the witness that both of them can go to Bhanupratappur and find work there. She also admitted that on the proposal given, she willingly accompanied him to Bhanupratappur and both of them were doing labour work there. She has also admitted that she did not inform her parents and friends about going to Bhanupratappur. Then she has admitted that while staying at Bhanupratappur, the appellant never forced himself on her or raped her, then she has made another statement that in a rented house, the appellant had raped her. Again she admitted that she did not inform anybody about the offence of rape committed by the appellant although, she had opportunity to do so.

9. Milanram (P.W.-6) is father of the prosecutrix. He has stated that his daughter went missing and then he lodged missing report with police, then the prosecutrix was recovered. She informed him that the appellant had allured her with promise to marry her and had taken her to Bhanupratappur. He has not made any statement regarding the offence of rape committed by the appellant. Siya Bai (P.W.-7) is the mother of the prosecutrix. She has not made any statement about the incident.

10. There is no need to consider and appreciate the rest of the statement of the witnesses, as the appellant has not at all disputed that he had eloped with the prosecutrix and had physical relation with her. The question that needs consideration is the age whether the prosecutrix was a consenting party and that whether she was major at the time of given such consent.
11. The evidence regarding the age is needed to be considered. Kamal Narayan Sinha (P.W.-2) is Assistant Teacher, who has stated on the basis of the admission register of the school that date of birth of the prosecutrix was recorded as 28.09.1997 vide Ex.P-4. According to this, the age of the prosecutrix on the date of incident was 16 years. In cross-examination, he has admitted that the entry made in the document Ex.P-4 and P-5, was not in his hand writing and he is not the author of the same. In view of the ratio laid down by the Hon'ble Supreme Court in case of ***Alamelu & Another Vs. State represented by Inspector of Police***², such evidence brought by the prosecution on the basis of school register can not be considered as conclusive proof regarding date of birth of the person concerned. Prosecutrix (P.W.-5) herself has made statement in her examination in chief, that she was aged about 16 years at the time of the incident. Milan Ram (P.W.-6), father of the prosecutrix has not stated about her age in examination-in-chief, but in cross-examination, he has admitted that he is about 45 years of age and got married when

² (2011) 2 SCC 385

he was 16-17 years of age and according to other admission made by him, it appears that the prosecutrix was born to him after five years of his marriage, which would show that on conclusion, the prosecutrix may be of age about 21 years. Siya Bai (P.W.-7) is mother, who has stated in examination-in-chief that at the time of incident, the prosecutrix was of age 16 years. In cross-examination, she has again made admission that she does not know the date of birth of her children and during the school admission the date of birth were entered casually. Hence, the parents of the prosecutrix themselves are not in position to make clear statement regarding the date of birth of the prosecutrix and the school register itself is not a conclusive proof. Hence, in this respect, the evidence of examining doctor becomes important.

12. Dr. Smt. Asha Tripathi (P.W.-9) states that the prosecutrix was aged about 17 years her secondary sexual characters were fully developed and given her report, Ex.P-19. She has stated that she has not advised for radiological examination for age of the prosecutrix because the age proof was produced before her. There is no mention of proof that was produced before the examining doctor regarding the age of the prosecutrix.
13. On over all consideration on the evidence regarding age of the prosecutrix, it appears that the prosecution has tried to establish the age of the prosecutrix below 18 years in a very vague

manner. The parents of the prosecutrix themselves are unsure about the age of the prosecutrix, even then, it was not advised that she should be examined radiologically, hence, it appears that the age of the prosecutrix was on the margin, hence, it can not be held clearly and beyond reasonable doubt that the age of the prosecutrix was below 18 years on the date of incident.

14. Subsequent to this finding that the prosecutrix was not a minor on the date of incident, the admission made by the prosecutrix (P.W.-5) in her cross-examination becomes relevant that she had herself willingly accompanied the appellant to find work at Bhanupratappur and stayed with him in the same house where he established physical relation with her on number of occasions. Although, the prosecutrix names that physical relation as rape, but her conduct is disclosed according to the admissions that she never complained about the physical relation that was made by the appellant with her to anybody with whom she had opportunity to complain and she never tried to contact her parents of her village, which shows that she was a consenting party in living with appellant, which goes to show that the prosecutrix had never objected rather she has consented to be with the appellant to have physical relation with him.
15. Hence on the basis of aforesaid discussion, it is found that the prosecution has failed to bring the evidence beyond reasonable doubt that any offence of abduction or rape has been committed

in this case.

16. For the foregoing reasons, the judgment of conviction and order of sentence passed by the learned Court below is set-aside. The appeal is allowed. If the appellant is on bail, his bail bonds shall continue for a period of six months subject to the provisions of Section 437 of Cr.P.C.

Sd/-
(Rajendra Chandra Singh Samant)
Judge