

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1271 of 2003

- Ahsan, Aged 22 years, S/o Sayyad Hasan @ Hassu, R/o Nayapara, Phool Chowk, P.S. Golabazar, Raipur, District Raipur (C.G.)

---- Appellant

Versus

- State of Chhattisgarh Through : Station Officer Police Station Kotwali, Raipur, District Raipur (C.G.)

---- Respondent/State

For Appellant	:	Ms. Pragiya Pandey, Advocate
For Respondent/State	:	Shri Pawan Kesharwani, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

17.10.2019

1. When the matter is called out twice, no one appears on behalf of the appellant even in first round as well as in second round. In these circumstances, this Court is left with no other option but to appoint the counsel through the High Court Legal Services Committee.
2. Ms. Pragiya Pandey, Advocate, present in the Court, empaneled Lawyer of High Court Legal Services Committee, on being asked by this Court, she is ready to argue the matter. Therefore, this Court has appointed Ms. Pragiya Pandey, Advocate to argue the matter on behalf of the appellant. Registry is directed to inform High Court Legal Services Committee in this regard for doing the needful.
3. This appeal arises out of the judgment of conviction and order of sentence dated 22.10.2003 passed by the Third Additional Sessions Judge, Raipur (C.G.) in Sessions Trial No. 155 of 2003, whereby the Appellant stands convicted and sentence as under:-

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of Indian Penal Code (in short 'IPC')	R.I. for one year and pay a fine of Rs.1,000/-, in default of payment to further undergo R.I. for two months

4. The prosecution case in brief, before the trial Court, was that on 16.08.2001, a report was lodged by PW-1 Rashida Bai (mother of prosecutrix) about missing of the prosecutrix, in the police station Kotwali, Raipur which was recorded in *Roznamcha Sanha* vide Ex.P/1. As per *Roznamcha Sanha*, on 13.08.2001 her daughter (prosecutrix) aged about 16 years, from 06:00 pm has gone somewhere without informing her (PW-1) and did not return to her home. She also gave description of her daughter in the *Roznamcha Sanha*. On the basis of missing report (Ex.-P/1), F.I.R. (Ex.-P/5) was registered on 24.10.2001 under Sections 363 and 366 of IPC by the Sub Inspector against appellant Ahsan. As per FIR (Ex.-P/5), the allegation against the appellant is that the appellant enticing the prosecutrix took her away from lawful guardianship. After investigation, challan was filed on 07.03.2002 for the offence under Sections 363 and 366 of IPC and accordingly charges were framed by the trial Court.
5. The prosecution in order to establish charge against the accused/appellant examined 7 witnesses namely PW-1 Rashida Bai, PW-2 Mohd. Shafik, PW-3 Devnarayan Yadav, PW-4 Mazmunisha, PW-5 A.S. Nagwanshi, PW-6 Gokul Tandi and PW-7 Ajay Dubey. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him and stated that he is innocent, he has been implicated in a false case. He examined the prosecutrix as DW-1 in his defence.
6. After hearing the parties, the trial Court has acquitted the accused/appellant of the charge under Section 366 of IPC, but convicted and sentenced him as mentioned in para- 3 of this judgment, hence this appeal.
7. Learned counsel for the appellant submits that the prosecution is not able to establish by adducing cogent and reliable evidence that the prosecutrix was minor on the date of incident. She also submits that as per the case of prosecution, age of the prosecutrix was below 18 years and therefore she had attained the age of exercising her discretion. She submits that the

prosecutrix was missing on 13.08.2001 whereas the report has been lodged on 16.08.2001 i.e. after three days and this inordinate delay has not been properly explained by the prosecution. She further submits that the prosecutrix left her home willingly and married the appellant of her own without any threat or pressure, therefore, the prosecutrix has not supported the prosecution case. Hence, the appellant cannot be convicted under Section 363 of IPC and he is entitled for acquittal.

8. On the other hand, learned Panel Lawyer appearing for the State has contended that the prosecutrix was minor and below 18 years of age as held by the trial Court, there is no illegality or infirmity in the findings arrived at by the trial Court. The prosecutrix was taken away from the lawful guardian on enticing her by the appellant, therefore, the impugned judgment of the trial Court needs no interference by this Court.
9. Having heard rival contentions of the parties, I have perused the record of Sessions Trial No. 155/2003.
10. Now, I shall examine whether on the date of incident, the age of the prosecutrix was below 18 years?
11. PW-1 Rashida Bai, mother of the prosecutrix, has stated in para- 1 that her daughter was called through one Udiya girl who resides where PW-1 resided and that girl's name is Guddu. She (PW-1) has stated that Guddu took her daughter to Ahsan and Ahsan took her daughter away with him. She has stated that on the date of incident, her daughter was minor and was studying in 6th standard. She has also stated that she did not know as to where Ahsan took her daughter and at present her daughter resides with Ahsan. She has further stated that she did not know the date of birth of her daughter (prosecutrix). PW-1 has admitted in para-2 of her evidence that she has two children and her marriage was performed prior to 25 years and after 4-5 years of her marriage, the prosecutrix was born. She had admitted that she has not got made birth certificate of her daughter, but the same was made

through village Kotwar. She has admitted that after obtaining the birth certificate from Kotwar, she submitted the same to the teacher of school. In para-3, she has admitted that at the time of lodging of missing report, she had not told about the accused/appellant. She has admitted in para-4 that the age of her daughter (prosecutrix) is 20 years. Looking to the evidence of mother of the prosecutrix (PW-1), her marriage was performed prior to 25 years and after 4-5 years of her marriage, the prosecutrix was born, it appears that the age of the prosecutrix would be near about 19-20 years on the date of incident.

- 12.** PW-2 Mohd Shafik, who is brother of the prosecutrix, aged about 15 years, has stated that on the date of incident, his elder sister (prosecutrix) was studying in 6th standard and she was about 3 years older to him.
- 13.** PW-4 Smt. Nazmunisha In-charge Principal of Urdu Girls Higher Secondary School, appeared in court with original Admission & Discharge Register, the photocopy of the same was marked as Ex.-P/2(c), in which the name of the prosecutrix, daughter of Abdul Habib, is recorded at Serial No. 88 in which the Admission No. 5286/register page No. 29 were mentioned. According to Ex.-P/2(c), the date of birth of the prosecutrix is 30.11.1984. In cross-examination, she admits that on the basis of transfer certificate of the prosecutrix of 5th standard, the entry of her date of birth was recorded, not on the basis of original birth certificate.
- 14.** The date of incident is 13.08.2001 and the date of birth of the prosecutrix is 30.11.1984 as mentioned in Ex.-P/2(c). Therefore, on the basis of Ex.-P/2(c), on the date of incident, the prosecutrix was below 18 years. Rashida Bai (PW-1) in cross-examination in para-4 has denied that age of her daughter is 20 years and stated that in school, she (PW-1) disclosed the age of the prosecutrix by increasing the same.
- 15.** Ex.-P/2(c), which is a photo copy of Admission & Discharge Register, is a public document and admissible in evidence, but looking to the evidence of

Rashida Bai (PW-1), 30.11.1984, being the date of birth of the prosecutrix, becomes doubtful.

16. DW-1 prosecutrix (DW-1) has stated that she resides with accused/appellant in his house and she married the accused/appellant on her own will and she was not kidnapped by the appellant. She has admitted in para-2 that she does not know her date of birth, the school certificate is false. She has stated that the date of her birth written in her school record, has wrongly been written and she has also stated that when she eloped with appellant, she was not minor.

17. It is not in dispute that the prosecutrix has married the appellant and after marriage, both prosecutrix and the appellant are living together in the house of the appellant. Looking to the evidence of the prosecutrix, it appears that the prosecutrix left her parental house willingly and she went away with the appellant and she was not kidnapped by the appellant.

18. So far as age of the prosecutrix is concerned, it has come in the evidence of PW-1 Rashida Bai that her marriage took place prior to 25 years and after 4-5 years of her marriage, the prosecutrix was born. Further, PW-1 admitted in her cross-examination in para-4 that the age of her daughter is 20 years. As per statement of PW-2 Mohd Shafik, he is three years younger to his sister (prosecutrix). Admittedly, no kotwari entry, no birth certificate is collected or produced during trial. The prosecutrix studied till 6th standard. There was no reason why kotwari entries are not collected and produced for assessment of age of the prosecutrix and in the present case, Kotwar was also not examined by the prosecution. It has also come in the evidence of PW-4 Mazmunisha in cross-examination that on the basis of transfer certificate of the prosecutrix of 5th standard, the entry of her date of birth was recorded, not on the basis of original birth certificate. Therefore, the date of birth mentioned in Ex.P/2(c) admission register has no evidentiary value and is of no help to the prosecution. Even the prosecution did not attempt for

ossification test and no reason for this has been given.

19.After going through the entire evidence available on record, this Court is of the opinion that the prosecution has failed to establish beyond reasonable doubt that the prosecutrix was below 18 years of age on the alleged date of the incident. The conduct of the prosecutrix (DW-1) clearly shows that she was a consenting party and she left her parental house willingly. Even the prosecution has not adduced any evidence to show that the prosecutrix was kidnapped or abducted by the accused/appellant from the lawful guardianship, therefore, no offence is made out against the appellant.

20.In the facts and circumstances of the case, this Court is of the considered opinion that the trial Court has not appreciated the evidence of the witnesses in its proper perspective and committed an error in convicting the accused/appellant under Section 363 of IPC.

21.For the foregoing reasons and discussions, the appeal is allowed. The conviction and sentence awarded to the appellant under Section 363 of IPC are set aside. The Appellant is acquitted of the said charge framed against him. If fine amount has been deposited, the same be refunded to the appellant.

22.It is also stated that the accused/Appellant is on bail since 08.12.2003, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437-A of Cr.P.C.

Sd/-

(Gautam Chourdiya)
Judge