

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.520 of 2009**

Kaushal Chouhan, son of Sarju Chouhan, aged 26 years,
R/o. Village Gadhgodhi, PS Sakti, District Janjgir-Champa
(CG)

---- Appellant**Versus**

State Of Chhattisgarh Through the Police Station Sakti,
District Janjgir-Champa (CG)

---- Respondent

For the appellant : Shri TK Tiwari, Advocate

For the State/respondent : Shri VB Singh, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment On Board****05.3.2019.**

1. Shri Akhtar Hussain, Advocate has been engaged by the appellant, but despite repeated calls, none appeared, therefore, Shri TK Tiwari, Advocate present in the Court is appointed as Amicus Curiae to argue the matter on behalf of the appellant.

2. The appeal is directed against judgment dated 18.6.2008 passed by Additional Sessions Judge, Sakti, Distt. Janjgir Champa (CG) in Session Trial No.174/2007 wherein the said Court convicted the appellant for commission of offence under Sections 363 and 366 A of the Indian Penal Code, 1860 and sentenced him for the offence under Section 366 A to undergo RI for five years and to pay fine of Rs.1500/- with default stipulation.

3. In the present case prosecutrix is PW-10. As per the version of the prosecution, on 06.4.2007 the prosecutrix went out

of the house to answer the call of nature and thereafter she did not come back to the house. Father of the prosecutrix enquired about her but she could not be traced, thereafter he lodged a missing report after two days. During investigation it was unearthed that on 06.4.2007 the appellant took her to village Gadghodi on the pretext of marriage and thereafter continuously committed intercourse with her. The matter was reported, the appellant was charge sheeted and convicted as mentioned above.

4. Learned counsel for the appellant submits as under:

(i) The trial Court erred in convicting the appellant on the same set of evidence on the basis of which the trial Court convicted the appellant for charges under Section 376(1) IPC.

(ii) The trial Court has failed to appreciate the fact that there is love affair between the appellant and the prosecutrix and the prosecutrix out of her own will ran away with the appellant and remained with him for sufficient time without any protest whatsoever.

(iii) The trial Court failed to appreciate that the prosecutrix is not minor, therefore, finding of the trial Court is liable to be set aside.

5. On the other hand, learned counsel for the State supporting the impugned judgment would submit that the finding of the trial Court is based on proper marshaling of the evidence and the same is not liable to be interfered while invoking the jurisdiction of the appeal.

6. I have heard learned counsel for the parties and perused the record of the Court below.

7. The first question of consideration before this Court is whether on the date of incident, i.e. 06.4.2007 the prosecutrix was minor or not. Sheetal Chand (PW-11) is father of the prosecutrix and he is not able to state the date of birth of the prosecutrix. Though one mark sheet was seized by the police (Article A/1), but the same is not proved by examination of a person who prepared the mark sheet and it is also not clear as to who informed the school authorities about the date of birth of the prosecutrix. Therefore, mark sheet is not a proved document to establish the date of birth of the prosecutrix.

8. Dr. Anil Pratap Singh (PW-20) deposed before the trial Court that after taking x-ray of the prosecutrix he opined about the age of the prosecutrix. Though he deposed that her age is about 14 years, but in his cross-examination, he has admitted that there is possibility of variation of two years. Now the point is whether the age of the prosecutrix can be ascertained on the basis of radiological examination. From the evidence of this witness it is not clear as to who took the x-ray of the prosecutrix and the said technician has not been examined as witness. Statement of the Radiologist is not more than an opinion. The Court has to base its finding upon the totality of the facts of the case. There is no birth register or school register in the record of the trial Court. Radiology test is not accurate to indicate the exact date of birth and when the father is not able to state the date of birth of the prosecutrix, it is difficult to record that the prosecutrix was minor on the basis of radiology test.

9. In this vast country with latitudes, heights/environment/vegetation, appearance of a person cannot be expected to be uniform. When there is nothing on record to establish the date of birth, the advisory nature of evidence of the radiologist is not proved that the prosecutrix was minor on the date of incident. Therefore, it cannot be held that she was taken or induced by the appellant from the lawful guardianship.

10. Prosecutrix (PW-10) deposed before the trial Court that appellant called her in Amaldeeha field and when she reached there, the appellant asked her to sit in the bicycle and thereafter she sat on the bicycle and again he took her to a bus and thereafter on train and moved to different places. She further deposed that she stayed about 2 months in the house of parental aunt of the appellant. She further deposed that she was in love with the appellant and when the appellant asked her to move with him, she came out of the house, took some ornaments and cash with her. She further deposed that the appellant promised her to marry and their relation was voluntary in nature. She deposed in her cross-examination that no force is used by the appellant and she maintained physical relation out of consent.

11. Looking to the entire evidence, it is not established that the prosecutrix was seduced for illicit intercourse. Therefore, charge under Section 366A IPC also is not established.

12. Accordingly, the appeal is allowed. Conviction of the appellant under Sections 363 and 366A IPC are hereby set aside and he is acquitted of the said charges. Fine amount paid by the appellant shall be refunded to him. The appellant is on bail. His

bail bonds shall 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

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