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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 07/02/2019****Judgment Delivered on : 01/03/2019****Criminal Appeal No. 633 of 2014**

Sukhnath S/o. Battulal Chouhan Aged About 22 Years R/o. Vill. Chherkabhantha, P.S. Sakti, Civil And Rev. Distt. Janjgir-Champa C.G., Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh Through The District Magistrate, Janjgir-Champa C.G., Chhattisgarh.

---- Respondent

For Appellant	:	Smt. Indira Tripathi, Advocate.
For Respondent/ State	:	Shri Avinash K. Mishra, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 3.7.2014 passed by Learned First Additional Sessions Judge, Sakti, District Janjgir-Champa, Chhattisgarh in Sessions Trial No.101 of 2013, whereby and whereunder the learned First Additional Sessions Judge has convicted the appellant for the offence under Sections 363, 366A and 376(1) of the IPC and sentenced him to undergo rigorous imprisonment for 5 years, 5 years and 10 years and to pay fine of Rs.5,000/-, Rs.5,000/- and Rs.10,000/- in default of payment of fine, to further undergo additional rigorous imprisonment for 2 months, 2 months and 4 months, respectively, with a direction to run all the sentences concurrently.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, the minor prosecutrix (P.W.-1) went missing on 12.04.2013 after the mid-night and a missing report vide Ex-P/10 was lodged by her mother-Inгла Bai (P.W.-4), naming the appellant as the person responsible. The prosecutrix (P.W.-1) was recovered from the possession of the appellant on 17.04.2013 vide Ex.-P/1. Statement was given by the prosecutrix and on that basis FIR Ex.-P/2 was lodged by registering offences under Sections 363, 366, and 376 of the I.P.C. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court.

(4) During trial, the Court below framed the charges under Sections 363, 366A and 376 (1) of the I.P.C. The prosecution examined nine witnesses to prove the guilt of the appellant. No witness was examined in defence. Statement of the appellant was recorded under Section 313 of the Cr.P.C. wherein the appellant denied the circumstances appearing against him and pleaded innocence and false implication in the crime in question.

(5) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellant as aforementioned.

(6) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(7) Learned counsel appearing on behalf of the appellant submits that the prosecutrix (P.W.-1) had been a consenting party and she had willingly accompanied the appellant to the places and has submitted physically on her free will. It is very clear from the statement of the prosecutrix (P.W.-1) that she and the appellant had a love affair. The prosecution has failed to prove that the age of the prosecutrix was below 18 years on the date of incident, because the prosecutrix herself admitted in her cross-examination that she does not know her date of birth, which was recorded in the Kotwar Register. She has admitted that while traveling with the appellant in train and by other modes of conveyance, she met with people, but she never informed anybody that she was abducted. Ghanshyam (P.W.-2) is the father of the prosecutrix who has admitted that at the time of his marriage he was between 18 to 19 years of age and also he cannot remember the date of birth of the prosecutrix. Ingla Bai (P.W.-4), the mother of the prosecutrix has admitted in her cross-examination that she does not know the date of birth of her children. The witness of school register Manohar Patel (P.W.-8) was not scribe of the entry regarding date of birth of the prosecutrix. Therefore, on the basis of these facts, the appellant was entitled for benefit of doubt. It is also submitted that the prosecution has deliberately avoided bringing evidence of ossification test, in which the radiologist has opined that the age of the prosecutrix was about 18 to 19 years. Reliance has been placed on the judgment of the Supreme Court

in the case of **Sunil Vs. State of Haryana** reported in **(2010) 1 SCC 742**. Reliance has also been placed on the judgments of this High Court in the cases of **Netram Sahu Vs. State of Chhattisgarh** reported in **2012 (4) CGLJ 168** and **Subelal Vs. State of M.P. (now CG)** reported in **2011 (4) CGLJ 424**. Hence, it is prayed that on these grounds, the appeal may be allowed and the appellant may be acquitted of the charges framed against him.

(8) Per contra, learned counsel for the Respondent/ State opposed the prayer and submissions. It is submitted that the prosecution has proved its case beyond reasonable doubt. The prosecutrix (P.W.-1) herself has claimed in her deposition that she is of age only 16 years. They have also stated that at the time of birth of the prosecutrix, they had entered her date of birth in the Kotwar Register. It is further submitted that the ossification test report is not exhibited, therefore, it cannot be read as evidence in favour of the appellant and no benefit can be drawn from it. It is also submitted that the prosecutrix (P.W.-1) has clearly stated that she has been raped by the appellant, therefore, no case is made out for acquittal in this case. Hence, no ground is made out for interference in the impugned judgment.

(9) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(10) The prosecutrix (P.W.-1) has stated that she was acquainted with the appellant and she was in love with him. On 12.04.2012, she had

eloped with the appellant as the appellant has assured that he will marry her. While staying in Bhatapara, the appellant raped her, then in another place near the railway station he again raped her and thereafter, she was recovered by the police. In cross-examination, she has admitted that she used to have affectionate conversation with the appellant on mobile phone and she had willingly accompanied the appellant. She has denied the adverse suggestion that the appellant had not raped her. No question has been put to her by the defence counsel that the physical relation with the appellant was consensual therefore her statement that she was raped by the appellant, has remained intact.

(11) Ghanshyam (P.W.-2), the father of the prosecutrix has stated about the missing of his daughter and her recovery. He also stated about the narration given by his daughter that she has been abducted and raped by the appellant. In cross-examination, his statement has remained un rebutted.

(12) Inгла Bai (P.W.-4), the mother of the prosecutrix has stated about lodging of missing report Ex.P/10 which was named against the appellant.

(13) Rajesh Kumar (P.W.-3) has stated about the recovery of the prosecutrix and also the narration given by the prosecutrix (P.W.-1) that she was abducted and raped by the appellant.

(14) B.R. Deharia, A.S.I. (P.W.-6) has stated that after lodging of missing report, search was made and the prosecutrix was found in the waiting hall of the bus stop at Darri in custody of the appellant where she was recovered from the appellant vide Ex.-P/1. According to the statement given by her, FIR Ex.-P/2 was lodged by registering offences under Sections 363, 366, and 376 of the I.P.C. This statement has also remained intact and unrebutted in her cross-examination.

(15) Dr. Smt. C.K. Singh (P.W.-7) had examined the prosecutrix on 18.04.2013 and on the basis of the symptoms found in her private parts, she has opined vide report Ex.-P/4 that the prosecutrix was recently subjected to sexual intercourse. Slides from the vaginal secretion were prepared and handed over with advice for FSL examination. In cross-examination, she has not admitted that she did not find any injuries externally or internally on the body of the prosecutrix and she could not opine about the time of tearing of the hymen, which she has observed in the finding. This medical evidence is clearly in support and corroboration with the statement given by the prosecutrix (P.W.-1) and there is not even a single admission made by her or any other witness that the prosecutrix had been a consenting and willing party in the sexual intercourse that has taken place with her. The appellant himself does not deny that he had sexual intercourse with the prosecutrix therefore, even if the issue of age of the prosecutrix (P.W.-1) is left apart this evidence is sufficient for holding that the appellant committed the offence of rape with the prosecutrix.

(16) Considering on the point of age of the prosecutrix, despite admissions made by the prosecutrix (P.W.-1) in cross-examination that she did not remember her date of birth and similar statement given by father Ghanshyam (P.W.-2) and mother Ingla Bai (P.W.-4), there is clear denial by the prosecutrix (P.W.-1) in her cross-examination that her age was above 18 years. Ghanshyam (P.W.-2) has denied that the age of his daughter was above 18 years on the date of incident. Similarly, Ingla Bai (P.W.-4) has also denied the suggestion given on this point.

(17) Manohar Patel (P.W.-8) is the school teacher, who, on the basis of the entry in the school register Ex.-P/19, has stated that the date of birth of the prosecutrix was 20.09.1997. In cross-examination, he has admitted that he has not scribed the same. The appellant placed reliance on the judgment of the Supreme Court in the case of **Sunil Vs. State of Haryana** (supra). In that case, it has been held that the entry in the school register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. In this regard, the person who has given the date of birth himself is unable to remember the date of birth, which he had given.

(18) Overall scrutiny of the papers of the record of the Court below, it is found that the report of the radiologist is attached in the file as un-exhibited document, which shows that it is a case of suppression of important evidence which could have been in favour of the appellant. The said act on the part of the prosecution really raises doubt and is a reason to draw adverse inference, which has to be taken into

consideration and on that basis it is held that the prosecution has clearly failed to prove that the prosecutrix (P.W.-1) was below 18 years of age on the date of incident. But on the basis of evidence and the facts of the incident, the commission of offence under Section 376 of the IPC is clearly made out. However, the offence under Sections 363 and 366A of the IPC needs reconsideration for the reason that the prosecutrix (P.W.-1) has clearly made this admission and the statement that she accompanied the appellant on her own will and as it is not proved that she is below 18 years, then her willingness to accompany would clearly exempt the accused/appellant from conviction under these offences, but the fact is that during this adventure, the appellant has exceeded his liberty and committed the offence of rape with the prosecutrix.

(19) After due consideration, the appeal is allowed in part. The conviction and sentence of the appellant under Sections 363 and 366A of the IPC is set aside, however, the conviction under Section 376 (1) of the IPC is upheld, but looking to the facts and circumstances of this case, his sentence is reduced to R.I. for 7 years alongwith fine of Rs.2,000/-.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE