

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 09.04.2019

Pronounced on 15.04.2019

CRIMINAL APPEAL No. 1601/1999

(Arising out of judgment of conviction and order of sentence dated 13.05.1999 passed by the second Addl. Sessions Judge, Ambikapur, Surguja (M.P.) (now in C.G.) in Sessions Trial No. 403/1994)

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Ramlal son of Bulchu Kanwar, age 22 years, R/o. Village Kundikala, PS Dhorpur, Distt. Surguja (MP) (now CG)

Versus

State of Madhya Pradesh (now Chhattisgarh) through PS Ambikapur, Distt. Surguja CG .

For appellant : Shri Kalyan Kalkar , Adv.

For Respondent/State : Shri Vinod Tekam, Panel Lawyer.

Hon'ble Mr. Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

1. In this criminal appeal, challenge is levied to the judgment of conviction and order of sentence dated 13.05.1999 passed by the second Addl. Sessions Judge, Ambikapur, Surguja(M.P.) (now in C.G.) in Sessions Trial No. 403/1994 whereby and whereunder he convicted and sentenced the appellant as under:-

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, Indian Penal Code (for short 'IPC')	RI for 2 years	xxxxxx
2.	366, IPC	RI for 5 years	xxxxxx
3.	376, IPC	RI for 7 years+ fine of Rs.200/-	Additional RI for 2 years

All the jail sentences are directed to run concurrently.

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was about 12 years old, she was a resident of Ganjar-anpara. On 21.06.1994 appellant enticed prosecutrix that he would marry her. Prosecutrix believed on his promise and went to Pratappur Naka. Thereafter, appellant took her to village Sedam where he committed repeatedly sexual intercourse with her. Meanwhile, her father informed Police Station Ambikapur on 21.06.1994 that she was

missing. On such information a report of missing person was registered. Thereafter, her father took back her from Sedam to his house. On 27.06.1994 an FIR was lodged against the appellant in Police Station Ambikapur. After completion of the investigation a charge-sheet was filed against him under Sections 363, 366, 376 of IPC. The trial Court framed charges against him under Sections 363, 366, 376 IPC. He abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 6 witnesses. He did not examine any witness on his defence. After conclusion of the trial, trial court convicted and sentenced him as aforesaid.

3. Being aggrieved, the appellant has preferred this criminal appeal.
4. Counsel for the appellant strenuously argued that the prosecution has failed to prove that the age of prosecutrix was below 18 years of age at the time of the alleged incident. She was a consenting party. Thus, aforesaid conviction and sentences are bad in the eyes of law and not sustainable. Thus, aforesaid conviction and sentences may be set aside and the appellant may be acquitted of the aforesaid charges.
5. The Govt. Adv. appearing for the State submitted that aforesaid conviction and sentences are based on clinching evidence led by the prosecution. He supported the aforesaid conviction and sentences and submitted that no interference is called for by this Court.
6. The first and foremost question for adjudication before this court is as to whether prosecutrix was below 18 years of age on 21.06.1994.
7. P.W.-2 prosecutrix and P.W.-3 Meeru who is father of the prosecutrix, do not say clearly and firmly the date of birth of prosecutrix. They do not say clearly and strongly as to what was the approximate age of the prosecutrix on 21.06.1994. Moreover, P.W.-2 prosecutrix says in Para 9 of her statement given on oath during her cross-examination, P.W.-3 Meeru says in Para 4 of his statement given on oath during his cross-examination, that Kalawati is the eldest daughter of P.W.-3 Meeru, Kalawati is about 30-35 years old, Manmati, Ramu, Chaituram are the other elder children of P.W.-3 Meeru, prosecutrix is the youngest daughter of P.W.-3 Meeru, there is a gap of 2-2 years between birth of these children.
8. In the case in hand, prosecution failed to prove any entry of Dakhil- Kharij register regarding date of birth of prosecutrix. For not

doing so there is no explanation from prosecution.

9. As per the alleged report of radiologist Ex. P-17, P.W.-5 Dr. M.K. Jain opined that the radiological age of prosecutrix was 14 to 16 years.

10. In **Jaya Mala v. Home Secretary, Government of Jammu and Kashmire And Others** [AIR 1982 SC 1297] the Hon'ble Supreme Court has observed that margin of error in age ascertained by radiological examination is two years on either side.

11. Looking to the aforesaid facts and circumstances of the case, looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Jaya Mala** (supra) this Court finds that prosecution has failed to prove beyond reasonable doubt that on 21.06.1994 prosecutrix was below 18 years of age.

12. Now second question for adjudication before this Court is as to whether prosecutrix was allegedly "a consenting party".

13. As per the prosecution story, appellant had allegedly enticed prosecutrix that he would marry her, she had left her paternal house and reached at Pratappur Naka, thereafter he took her to Sedan. P.W.2 prosecutrix says in Para 1 that appellant had told her to go to Ambikapur for roaming, thus she went along with him. During going from Ambikapur to village Sedam, and during residing at Sedam, prosecutrix neither shouted for her rescue nor complained to anyone against appellant.

14. In **Rajkumar Bajaj @ Raja v. State of C.G.** [2012 (4) CGLJ 437] the learned Single Judge of this Court has observed in para-9 as under :-

"9. Minute examination of the evidence of the witnesses particularly that of the prosecutrix (PW-3), her parents (PW-1 and PW-2) and Laxmi Bai (PW-9) goes to show that she (prosecutrix) was a consenting party. Evidence further shows that the prosecutrix lived in the house of Dhaniram (PW-4) along with accused Raja for five days and used to go out for answering the call of nature and fetching water from the hand pump but during this long period she, in spite of having full opportunity, did not make any complaint to anyone about her being confined by the accused/ appellant Raja. This conduct of the prosecutrix also makes it clear that she was consenting party to the act of

accused/ appellant Raja. Now the only question is regarding her age. Prosecution has filed photocopy of the *Kotwari* register (Ex. P-15-A) but even this document has not been proved by the prosecution in accordance with law. Original *Kotwari* register has not been produced in the Court by the prosecution nor there is any evidence to show as to on what basis the date of birth of the prosecutrix was entered in the said *Kotwari* register as 20.07.1980. Even the parents of the prosecutrix have not stated anything regarding the age of the prosecutrix. Moreover, the doctor (PW-8) who medically examined the prosecutrix has stated that she was a fully grown up woman. Though the record shows that prosecutrix was referred for x-ray for determination of age, there is no such report on record”

15. In **Subelal v. State of M.P. (Now C.G.)** [2011(4) CGLJ 424] in para-12 the learned Single Judge has observed as follows:-

“12. Now we shall examine the conduct of the prosecutrix. The case of the prosecution is that the prosecutrix accompanied the appellant and she went from village Zoratarai to village Bhakara on his bicycle. From Bhakara, they boarded a bus and went to Dhamtari. Further, from Dhamtari, they went to village Utai to the house of the sister of the appellant, they again boarded a mini bus and went to Bhilai (Power House). The appellant took the prosecutrix to the house of his other sister who was residing in Bhilai. The prosecutrix alleges that she was subjected to forcible sexual intercourse by the appellant in the house of his sister. Though the prosecutrix visited many places with the appellant, but she did not make any compliant and accompanied him in normal manner. This shows that she was not abducted and was not taken by force and she accompanied the appellant on her own will and it was not a case that the appellant committed sexual intercourse without her consent. Considering the evidence of age and conduct of the prosecutrix, I am of the view that the prosecutrix was a consenting party with the appellant and in the above facts and circumstances of the case, the offences u/ss 363, 366 & 376 Indian Penal Code would not be made out against the appellant.”

16. Looking to the above mentioned facts and circumstances of the

case, looking to the aforesaid judicial precedents laid down by **Rajkumar Bajaj @ Raja** (supra) and **Subelal** (supra), this Court finds that prosecutrix was a 'consenting party'.

17. Third question for adjudication before this Court is as to whether the consent of prosecutrix was "free consent".

18. The Hon'ble Supreme Court in the matter of **Uday -v- State of Karnataka** [(2003) 4 SCC 46] held as under :-

"for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no straight jacket formula can be laid down but following factors stand out (i) where a girl was of 19 years of age and had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge the prosecutrix has consented in consequence of a misconception of fact arising from his promise, (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. On the basis of the above factors this court did not feel persuaded to hold that consent was obtained by misconception of fact on the part of the victim."

19. In the matters of **Yedla Srinivasa Rao -v- State of AP** [(2006)8 Supreme 326] and **Deepak Gulati -v- State of Haryana** [(2013) 7 SCC 675], Hon'ble Supreme Court has laid down following judicial precedent that -

"merely because accused could not keep his promise on account of unavoidable circumstances, prosecutrix cannot be said to have given her consent under misconception of fact arising from any false promise of marriage."

20. This is not the prosecution case that appellant had allegedly refused to marry prosecutrix.

21. There is no such evidence available on record on strength of which it can be said that the intention of the appellant right from the beginning was not bonafide and he had made a false promise to marry prosecutrix, from the initial stage he had no intention to marry her.

22. As per the provisions of Section 375 of the IPC, Sixthly [the

Criminal Law (Amendment) Act, 2013 came into force on 3rd day of February, 2013] a man is guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 18 years of age. Before this amendment for constituting this offence the age of prosecutrix was under 16 years.

23. Looking to the above mentioned facts and circumstances of the case, Judicial Precedents laid down by Hon'ble Supreme Court in the matters of **Uday** (supra), **Yedla Srinivasa Rao** and **Deepak Gulati** (supra), this Court finds that consent of the prosecutrix was 'free consent'.

24. Looking to the above mentioned facts and circumstances of the case this court finds that prosecution has failed to prove beyond reasonable doubt the charges punishable u/s 363, 366, 376, IPC. Thus, trial court committed illegality in convicting and sentencing appellant as aforesaid. Hence, the appeal is allowed. The impugned judgment of conviction and order of sentences are hereby set aside. This court acquits appellant of the charges punishable u/s 363, 366 and 376 IPC extending him benefit of doubt. The fine amount if deposited, be refunded to appellant after the expiration of prescribed period of limitation for further legal remedy available to the party.

25. The appellant is on bail. His bail bond shall continue for a further period of 6 months as per requirement of Section 437-A of the Cr.P.C.

Sd/-
(**Sharad Kumar Gupta**)
Judge