

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 22-2-2019****Pronounced on 26-2-2019****CRIMINAL APPEAL No. 2985/1998**

(Arising out of judgment of conviction and order of sentence dated 10-12-1998 passed by the Addl. Sessions Judge, Khairagarh, Sessions Division Rajnandgaon, MP (now in CG) in Sessions Trial No. 88/98)

1. Mohammed Shamshuddin aged about 32 years son of Badruddin resident of village Taranga, PS Bhatapara, district Raipur presently resident of Dauchaura, Khairagarh, Distt. Rajnandgaon, MP (now in CG)
2. Mohammed Sabir alias Raju aged about 27 years son of Gul Mohammed resident of Vidyanagar, opposite Police Line, Raipur, MP (now in CG)
3. Mohammed Rizwan aged about 23 years son of Rahman resident of Turkaripara, Distt. Rajnandgaon, MP (now in CG)

Appellants**Versus**

State of MP (now CG), through PS Khairagarh, Distt. Rajnandgaon, MP (now CG).

Respondent

For appellants No. 1 and 3	: Shri Adil Minhaj, Adv.
For appellant No. 2	: Shri Sudhir Verma and Shri CR Sahu, Adv.
For Respondent/State	: Shri Vikram Dixit, Govt. Adv..

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 10-12-1998 passed by the Addl. Sessions Judge, Khairagarh, Sessions Division Rajnandgaon, MP (now in CG) in Sessions Trial No. 88/98 whereby and whereunder he convicted and sentenced the appellants as under:-

Appellants No. 2 Mohd. Sabir and appellant No. 3 Mohd. Rijwan

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, Indian Penal Code (for short 'IPC')	RI for 7 years + fine of Rs. 2,000/-	Additional RI for 6 months
2.	366, IPC	RI for 7 years + fine of	Additional RI for

		Rs. 2,000/-	6 months
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Appellants No. 1 Shamshuddin

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, Indian Penal Code (for short 'IPC')	RI for 7 years + fine of Rs. 2,000/-	Additional RI for 6 months
2.	366, IPC	RI for 7 years + fine of Rs. 2,000/-	Additional RI for 6 months
3	376, IPC	RI for 10 years + fine of Rs. 3,000/-	Additional RI for 6 months

All the substantive jail sentences have been directed to run concurrently.

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was about 14 years old. She was a resident of Gol Bajar, Khairagarh. She and appellant No. 1 Mohd. Shamshuddin were agreed to perform marriage. He had promised her that he will give divorce to her married wife. They used to send letters to each other. On 28-4-1997 at about 1.30 pm she had left her paternal house, after sitting in the bicycle of appellant No. 3 Mohd. Rijwan, she went to Dau Chaura. Near the burial ground she sat on Moped of appellant No. 1 Mohd. Shamshuddin, they went to village Garrapar. Thereafter they, appellant No. 2 Mohd. Sabir went to Jabalpur by Tampo Trax. Thereafter they went to Damoh where they stayed about 1 and half months in the house of Julla Begum who is paternal aunt of appellant No. 2 Mohd. Sabir. Thereafter they went Jabalpur and resided in a rented house. Thereafter she and appellant No. 1 Mohd. Shamshuddin went to Kawardha. Thereafter on saying of appellant No. 1 Shamshuddin she returned back in her paternal house. Meanwhile on 1-5-1997 her father had lodged an FIR in police station Khairagarh. After completion of the investigation charge-sheet was filed against

appellants. The trial Court framed charges against all the appellants under Sections 363, 366, IPC and against appellant no. 1, charge of offence under Section 376, IPC was also framed. They abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 9 witnesses. They did not examine any witness on his defence. After conclusion of the trial, trial court convicted and sentenced them as aforesaid.

3. Being aggrieved, the appellants have preferred this criminal appeal.

4. Counsel for the appellants strenuously argued that the prosecution has failed to prove that the age of prosecutrix was below 18 years 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 appellants 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 28-4-1997.

7. P.W. 1 Abdul Rafiq who is father of the prosecutrix says in para 4 and 7 of his statement given on oath that on 28-4-1997 prosecutrix had given the examination of Class 8th. At the time of alleged incident, her daughter was 13 years old.

8. P.W. 1 Abdul Rafiq says in para 8 during his cross-examination that he had admitted prosecutrix in school and at that time he had got

written her date of birth.

9. As per the TC of Model Girls Higher Secondary School, Khairagarh Ex. P-14 date of birth of the prosecutrix is 8-4-1983.

10. In **Birad Mal Singhvi v. Anand Purohit** (AIR 1988 SC 1796) the Hon'ble Supreme Court observed in paras-14 and 15 as under:

“**14**.....If the entry in the scholar's register regarding date of birth is made On the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10. 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.....

15. ...To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded....”

11. In **Babloo Pasi v. State of Jharkhand and Another** (2008 AIR SCW 7332), Hon'ble Supreme Court in para 22 observed as under:-

“**22.** Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official

book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

12. It would be manifest to refer para-25 of the judgment of the Supreme Court in **Sunil v. State of Haryana** [2010 (1) SCC 742] which is extracted as under:-

“**25.** The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.”

13. In **Alamelu and another Vs. State represented by Inspector of Police**, (2011) 2 SCC 385, the Supreme Court held :

“that the transfer certificate which is issued by a government school and is duly signed by Headmaster would be admissible in evidence u/s 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much

evidentiary value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.”

14. In the case in hand P.W. 1 Abdul Rafiq, P.W. 2 Prosecutrix and P.W. 3 Amjad Khan who is real brother of the prosecutrix do not say clearly and strongly about the date of birth of the prosecutrix and reasons therefor.

15. P.W. 9 Aditya Khare, in-charge principal of Girls Higher Secondary School, Khairagarh says in para 5 during his cross examination that he had not admitted prosecutrix in the school, she was admitted by the then principle who was posted at that time.

16. In the case in hand, prosecution failed to examine concerned officer who had written the said date of birth of the prosecutrix at the time of her admission in the school, in the declaration form or in the school register, that could have been a source of information for the date of birth of the prosecutrix. Prosecution has failed to give any explanation as to why it was not done.

17. Looking to the aforesaid facts and circumstances of the case, judicial precedents laid down by Hon'ble Supreme court in **Birad Mal Singhvi** (Surpa), **Babloo Pasi** (Supra), **Sunil** (Supra), **Alamelu** (Supra) this court disbelieves aforesaid statements of para 4 and 7 of P.W. 1 Abdul Rafiq, and Ex. P-14 in the reference that on 28-4-1997 the prosecutrix was below the 18 years of age.

18. As per alleged MLC report Ex. P-6, P.W. 6 Dr. Kanti Gangajaliwale opined after the Dental examination that prosecutrix was around 14-15 years of age.

19. In Ex. P-6, P.W. 6 Dr. Kanti Gangajaliwale had advised x-ray of long bone of prosecutrix for confirmation of age.

20. P.W. 6 Dr. Kanti Gangajaliwale says in para 3 and 4 during her cross-examination that she is not dental expert. This is true that without ossification test the age cannot be determined correctly.

21. In the case in hand no ossification test was conducted by the prosecution of the prosecutrix for determination of her age.

22. In **Jaya Mala v. Home Secretary, Government of Jammu and Kashmir 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.

23. 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 disbelieves Ex. P-6 in the reference that on 28-4-1997 the prosecutrix was below 18 years of age.

24. After the appreciation of the evidence discussed herebefore this Court finds that prosecution has failed to prove beyond reasonable doubt that on 28-4-1997 prosecutrix was below 18 years of age.

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

26. As per the prosecution story, prosecutrix was agreed to marry with appellant No. 1 Mohd. Shamshuddin. On 28-4-1997 she had left her paternal house by sitting on bicycle of appellant No. 3 Mohd. Rijwan, she went to Dau Chaura. Thereafter, she sat on the moped of appellant No. 1 Mohd. Shamshuddin and went to Garrapar along with him. Thereafter they and appellant No. 2 Mohd. Sabir went to Jabalpur

by Tampo Trax. From there they went to Damoh. They lived for one and half month in the house of paternal aunt of appellant No. 2 Sabir. Thereafter they went to Jabalpur and lived in a rented house. Thereafter she and appellant No. 1 Mohd. Shamshuddin went to Kawardha.

27. P.W. 1 Abdul Rafiq says in para 2 during examination in chief that in the bag of prosecutrix a letter was found. From reading of the said letter, it was revealed that she had planned for absconding. P.W. 2 Prosecutrix says in para 3 during examination in chief that first he had sent a letter to appellant No. 1 Mohd. Shamshuddin. She says in para 5, 11 (twice) and 15 during her cross-examination that she had written the letters Ex. D-2 Ex. D-3, Ex. D-4, Ex. D-5 and Ex. D-6 to appellant Mohd. Shamshuddin. This Court finds that these letters are the love letters. This is true that she wanted to go on her wish and will thus, she had sat on the carrier of the cycle of appellant No. 3 Mohd. Rijwan. She had not made complaint to anyone during residing in Damoh, Jabalpur and Kawardha. At the time of sexual intercourses, she had snatched the hairs of appellant No. 1 Mohd. Shamshuddin but this fact is omitted in her police statement Ex. D-7. During residing at Jabalpur, they used to meet with some other persons. This is true that they were going for dinner in the house of people of their community. This is true that she did not complain to anyone.

28. 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”

29. 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 complaint 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.”

30. 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'.

31. Third question for adjudication before this Court is as to whether the consent of prosecutrix was “free consent”.

32. P.W. 2 Prosecutrix says in para 4 that she had gone along with appellant No. 1 Mohd. Shamshuddin on account of his enticement on pretext of marriage.

33. 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.”

34. In the matters of **Yedla Srinivasa Rao -v- State of AP** [(2006)8 Supreme 326] and **Deepak Gulati -v- State of Haryana** [(2013) 3 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.”

35. As per the prosecution story appellant had assured the prosecutrix that he will get divorce to his legally wedded wife. It means that prosecutrix was knowing that the appellant is already married and he had not given divorce to his legally married wife.

36. 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 with her.

37. 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.

38. 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 disbelieves the statement of para 4 of prosecutrix in the reference that her consent was not free consent and this Court finds that consent of the prosecutrix was free consent.

39. 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 appellants

as aforesaid. Hence, the appeal is allowed. The impugned judgment of conviction and order of sentences are hereby set aside. This court acquits appellants of the charges punishable u/s 363 and 366, IPC extending them benefit of doubt. This Court also acquits appellant No 1 Mohd. Shamsuddin of the charge punishable under Section 376 of the IPC extending him benefit of doubt.

40. The appellants are on bail. Their bail bonds 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