

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 01.08.2019

Pronounced on 5.08.2019

CRIMINAL APPEAL No. 3362 of 1999

(Arising out of judgment of conviction and order of sentence dated 09.12.1999 passed by the Second Additional Sessions Judge, Jagdalpur (Bastar) (C.G.) in Sessions Trial No. 39/1999)

.....

1. Jogender (in the impugned order name of the appellant is mentioned as “Jogendra”) son of Bhola Prasad, aged about 20 years, resident of village Aktaguda, Kindalgaon, Police Station Nagarnar, Distt. Bastar.

2. Shobha son of Bhola Prasad aged about 24 years, resident of village Borpadar, PS Jagdalpur, Distt. Bastar.

VERSUS

State of Madhya Pradesh (now Chhattisgarh)

Respondent

For appellants : Mr. Satish Gupta, Advocate.
For Respondent/State : Mr. Ashutosh Pandey, 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 09.12.1999 passed by the Second Additional Sessions Judge, Jagdalpur (Bastar) (C.G.) in Sessions Trial No. 39/1999 whereby and whereunder he convicted and sentenced the appellants as under:-

Appellant No. 1 Jogendra :-

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, IPC	RI for 5 years+ fine of Rs.1000/-	RI for one year.

2.	366,IPC	RI for 5 years+ fine of Rs.1000/-	RI for one year.
3.	376,IPC	RI for 10 years+ fine of Rs.1000/-	RI for one year.

Appellant No. 2 Shobharam:-

Sr. No.	Offence u/S.	Sentence	In default of payment of fine
1.	363, IPC	RI for 5 years+ fine of Rs.1000/-	RI for one year.
2.	366,IPC	RI for 5 years+ fine of Rs.1000/-	RI for one year.

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

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was about 15 years old. She was resident of village Rampal. On 13.05.1998 she, Dalimi and Balmati had gone to float flowers offered during worship to Indravati river. At about 04:30 pm appellants reached near her and took her by pulling to village Ektaguda. Appellant No.1 Jogendra committed repeatedly sexual intercourse with her. On 14.05.1998 her father Sukhnath Singh Thakur lodged an FIR at police station Nagarnar. After completion of the investigation a charge-sheet was filed against them under Section 363, 366, 376 r/w 34 Indian Penal Code (hereafter called as I.P.C.). The trial Court framed charges against them under Sections 363, 366 and 376(g) IPC. They abjured the charges and faced trial. To bring home the charges the prosecution examined 9 witnesses in all. They did not examine any witness on their defence. After conclusion of the trial, trial court convicted and sentenced them as aforesaid, however, trial Court acquitted them from the offence punishable under Section 376(g) IPC.

3. Counsel for the appellant strenuously argued that the prosecution has failed to prove the charges against appellants beyond reasonable doubt. Trial Court did not appreciate the evidence in proper perspective. Prosecution failed beyond reasonable doubt that on 13-5-1998 she was below 18 years of age. She was 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.

4. Panel Lawyer 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.

5. The first and foremost question for adjudication before this court is as to what was the age of prosecutrix on 15.03.1998.

6. P.W.1 Sukhnath says in para No.1 of his statement given on oath on 07.08.1999 that prosecutrix is either 15 or 16 years old.

7. As per the alleged progress report Ex. P-4 the date of birth of the prosecutrix is 03.01.1983.

8. As per the M.L.C. report Ex. P-5, P.W. 8 Dr. Smt. Heena Ahmed had examined the prosecutrix and by external examination she observed her age to be 15 years.

9. 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....”

10. 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.”

11. 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.”

12. 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.”

13. P.W.1 Sukhnath, P.W.2 prosecutrix do not say clearly and strongly about the date of birth of the prosecutrix and reasons therefor.

14. Aforesaid observation given by P.W.8 Dr. Smt. Heena Ahmed is based on merely physical examination. It is not based on any scientific or medical test.

15. In the case in hand Prosecution failed to conduct the ossification test or dental test of the prosecutrix to determine her age.

16. In the case in hand, the prosecution failed to prove the entry of the aforesaid date of birth of prosecutrix in Dakhil Kharij Register and Declaration Form by examining the author of the same. Prosecution also failed to examine any person who had special means of knowledge of the aforesaid date of birth of prosecutrix which he/she had informed at the time of said entry to the concerned authority which has been written in the declaration form, that could have been main source of information for the date of birth of the prosecutrix. The prosecution 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 statement of P.W. 1 Sukhnath, Ex. P-4 and Ex. P-5, in the reference that on 13.05.1998, prosecutrix was below the 18 years of age.

18. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that on 13.05.1998 the age of prosecutrix was below 18 years.

19. Now the second question for adjudication before this court is that whether prosecutrix was allegedly a "free consenting party".

20. P.W.2 prosecutrix says in para 3 during her cross-examination that there was love affair between her and appellant No. 1 Jogendra since one year. She says in para 4, 6, 7, 8, 9 that 10-20 persons were fishing in the river, during going to village Ulnar, Bhadguda, Ektaguda, number of the persons had met them, she shouted but nobody rescued her, this is unnatural circumstance. In the village Bhaduguda and Ektaguda women, children and men were also present in house. In the village Bhaduguda she had demanded a bedsheet from the resident of that house and laid the same on the ground. This is true that when

appellant No. 1 Jogendra was committing sexual intercourse with her she kissed him. Appellant No. 1 Jogendra had bitten on different parts of her body. She had written the love letters Ex. D-2 to Ex. D-19. Ex. D-2 to Ex. D-4 have been written by her own blood.

21. P.W.3 Dalimi says in para 2 during her cross examination that appellant No. 1 Jogendra had told prosecutrix to go, then she went with him. Moreover, P.W.5 Balo says in para 2 during her cross-examination that prosecutrix had told her and Dalimi that she would inform to her family members that she is going along with appellant No. 1 Jogendra thus they could not have shouted.

22. As per the alleged MLC report Ex. P-5, P.W. 8 Dr. Smt. Heena Ahmed had not found any injury on her body as well as on her private part, there was no tenderness on her private part. P.W.8 Dr. Smt. Heena Ahmed says in para 3 during her cross-examination that she was habitual for sexual intercourse.

23. 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 event 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”

24. 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.”

25. 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.

26. Looking to the above mentioned facts and circumstances of the case, Judicial Precedents laid down by learned Single judge of this court in the matter of **Rajkumar Bajaj alias Raja** (supra), **Subelal** (supra), this court finds that prosecutrix was “free consenting party”.

27. 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 IPC against appellants and of the charge punishable under Section 376, IPC against appellant No. 1 Jogendra. Hence, the appeal is allowed. Aforesaid judgment of the conviction and order of sentences are set aside. This court acquits appellants of the charges punishable u/s 363, 366 IPC and appellant No. 1 Jogendra also of the charge punishable under Section 376 IPC, extending benefit of doubt to them.

28. After the expiration of prescribed period of legal remedy available

to the party, the fine amount so deposited by the appellants be returned to them.

29. The appellant are on bail. their bail bonds stand discharged subject to the provisions contend in Section 437-A of the Cr.P.C.

Sd/-
(Sharad Kumar Gupta)
Judge