

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 25.04.2019

Pronounced on 30.4.2019

CRIMINAL APPEAL No. 1459/2000

(Arising out of judgment of conviction and order of sentence dated 3-5-2000 passed by the First Addl. Sessions Judge, Raigarh (C.G.) in Sessions Trial No. 67/1996)

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Mangtaram son of Balakram Pao, aged 27 years, R/o. Village Lohar Singh, P.S. Pussore, Distt. Raigarh (MP) (now CG)

Versus

State of Madhya Pradesh (now CG) through Distt. Magistrate, Raigarh, Distt. Raigarh (MP) (now CG)

For appellant : Shri F.S. Khare, Adv.

For Respondent/State : Shri Ishan Verma, 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 3-5-2000 passed by the First Addl. Sessions Judge, Raigarh (C.G.) in Sessions Trial No. 67/1996 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, IPC	RI for 1 year	xxxxx
2.	366, IPC	RI for 3 years + fine of Rs. 500/-	RI for 3 months

2. This is admitted by appellant that prosecutrix is the daughter of P.W. 1 Baratram Sav and P.W. 11 Smt. Sukanti Sav, at the time of alleged incident prosecutrix was studying in class 12th.

3. In brief, the prosecution story is that at the time of alleged incident, prosecutrix was aged about 17 years. Appellant was enticing her by love talks. On 6-1-1996 he took her to Balangir by threatening that if she would not come then he would commit suicide. He committed repeatedly sexual intercourse with her. Meanwhile, P.W. 1 Baratram Sav intimated in police station Pusor where report of Missing Person

was lodged. Thereafter an FIR was lodged in PS Pusor. After completion of the investigation a charge-sheet was filed against him under Sections 363, 366(a) and 376 of the Indian Penal Code (in brevity 'IPC'). The trial Court framed charges against him under Sections 363, 366(a), 376(1), IPC. He abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 12 witnesses. He examined one witness on his defence. After conclusion of the trial, trial court convicted and sentenced him as aforesaid. However, trial Court acquitted him of the charge punishable under section 376(1), IPC.

4. Being aggrieved, the appellant has preferred this criminal appeal.

5. Counsel for the appellant 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 appellant may be acquitted of the aforesaid charges.

6. The Panel Lawyer 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.

7. The first and foremost question for adjudication before this court is as to whether prosecutrix was below 18 years of age on 6-1-1996.

8. P.W. 1 Baratram says in para 1 of his statement given on oath that at the time of alleged incident prosecutrix was aged about 17 years.

9. P.W. 11 Smt. Sukanti Sav says in para 3 of her statement given on oath that at the time of alleged incident prosecutrix was aged about 16 ½ years.

10. P.W. 1 Baratram Sav, P.W 10 prosecutrix, P.W. 11 Smt. Sukanti Sav do not say clearly and strongly as to what is the date of birth of prosecutrix. P.W. 1 Baratram Sav and P.W. 11 Smt. Sukanti Sav had stated approximate age of prosecutrix, they did not say that what is the basis to say aforesaid approximate age.

11. In the case in hand, prosecution failed to prove any entry of

Dakhil- Kharij register, or any other document regarding date of birth of prosecutrix. For not doing so there is no explanation from prosecution.

12. Looking to the above mentioned facts and circumstances of the case and concerned admitted fact, this Court finds that on the basis of aforesaid statements of P.W. 1 Baratram Sav and P.W. 11 Smt. Sukanti Sav, it is not established that at the time of alleged incident prosecutrix was below 18 years of age.

13. As per the alleged report of radiologist Ex. P-7, P.W. 8 Dr. M.D. Joshi opined that the age of prosecutrix was between 16 to 18 years.

14. 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.

15. Looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Jaya Mala** (supra) this Court finds that from Ex. P-7 it is not established that at the time of alleged incident prosecutrix was below 18 years of age.

16. Looking to the above mentioned facts and circumstances of the case, this Court finds that prosecution has failed to prove beyond reasonable doubt that at the time of alleged incident prosecutrix was below 18 years of age.

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

18. P.W. 10 Prosecutrix does not say clearly and firmly as per the prosecution case that allegedly appellant had taken her saying that if she would not come then he would commit suicide. Moreover, during going along with appellant and residing in different places, prosecutrix neither shouted for her rescue nor complained to anyone against appellant. Moreover, she says in para 5 and 6 during her cross-examination that this is true, letter Ex. D-2 to Ex. D-38 she had written to him, she loved him. Moreover, D.W. 1 Chamraram Naik says in para 1 of his statement given on oath that P.W. 11 Smt. Sukanti Sav had told that prosecutrix was insisting that she will marry the appellant, there is no such material available on record on strength of which it can be said that the said statement of D.W. 1 Chamraram Naik is not simple, not natural and not normal.

19. 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”

20. 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/s 363, 366 & 376 Indian Penal Code would not be made out against the appellant.”

21. 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 'free consenting party'.

22. 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 and 366(a), 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 and 366(a), 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.

23. 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