

**AFR****HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 23.08.2019****Pronounced on 26.08.2019****CRIMINAL APPEAL No. 702 of 2008**

(Arising out of judgment of conviction and order of sentence dated 18-8-2008 passed by the Special Sessions Judge (constituted under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities ) Act, 1989, Sessions Division Sarguja at Ambikapur (C.G.) in Spl. Sessions Case No. 71/2007)

Vinod @ Ayodhya Prasad S/o Meghna Yadav, aged about 19 years,  
Occupation-Agriculture, R/o Village-Bathora, P.S. Balrampur,  
Distt.-Sarguja C.G.

**---- Petitioner****Versus**

State Of Chhattisgarh Through The Station House Officer, P.S.  
Balrampur, Distt.-Sarguja C.G.

**---- Respondent**


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For appellant : Mr. Pramod Verma, Sr. Adv. With shri  
Virendra Verma, Adv.  
For Respondent/State : Mr. Praveen Shrivastava, Panel Lawyer.

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**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 18-8-2008 passed by the Special Sessions Judge (constituted under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities ) Act, 1989 (in short 'SCST Act'), Sessions Division Sarguja at Ambikapur (C.G.) in Spl. Sessions Case No. 71/2007 whereby and whereunder he convicted and sentenced the appellant as under:-

| <b>Sr. No.</b> | <b>Offence u/S.</b> | <b>Sentence</b>                    | <b>In default of payment of fine</b> |
|----------------|---------------------|------------------------------------|--------------------------------------|
| 1              | 376 (1), IPC        | RI for 7 years+ fine of Rs.200/-   | RI for one month.                    |
| 2.             | 450, IPC            | RI for 3 years + fine of Rs. 200/- | RI for one month                     |

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

2. In brief, the prosecution story is that on 30-9-2006 prosecutrix was 14 years old. She was a resident of village Bathaura. She is a member of scheduled tribe. On 29-9-2006 at about 4.00 pm she was returning back to her house from the school. Near her house appellant met her and told that in the night he will come to her house. She asked him not to come. On 30-9-2006 at about 8.00 pm she was sleeping alone in a room. Her two brothers were sleeping along with their family members at courtyard. At about 11.30 pm he after lying beside her, woke her up and committed rape with her, she tried to rescue herself and tried to shout. He gagged her mouth by his lungi, threatened her to kill. Due to fear she did not shout. He went from her house saying that he will again come tomorrow. On 1-10-2006 she narrated the incident to her Badi Bhabhi Janmati. She washed her clothes on very day. On 1-10-2006 at about 11.00 pm she was sleeping in her room. Feeling the touch on her body, she woke up. She saw that appellant was pulling her underwear. When she was ready to cry, he pressed her mouth by his lungi and committed sexual intercourse with her. When he was going she shouted to her brother Sunil Kujur. He and her another brother Ismel Kujur entered in her room, slapped appellant and inquired from him. Due to shame she ran away towards forest and returned back on 2-10-2006 at 7.00 pm. Her family members consulted the matter. On 4-10-2006 she went to police station Balrampur and lodged an FIR against him. After completion of the investigation a charge-sheet was filed against him under Sections 450, 376, 506, Indian Penal Code (hereafter called as 'IPC') and Section 3(1)(xii) of the SCST Act. The trial Court framed charges against him under Sections 3(2)(v) of the SCST Act, in alternate, S. 376(1) of the IPC, Section 450, 506(II), IPC. He abjured the charges and faced trial. To bring home the charges the prosecution examined as many as 18 witnesses. He examined 2 witnesses in his defence. After conclusion of the trial, trial court convicted and sentenced him as aforesaid, however, trial Court acquitted him of the offence punishable under Section 3(2)(v) of SCST Act and Section 506, IPC.

3. Counsel for the appellant strenuously argued that the prosecution

has failed to prove beyond reasonable doubt that at the time of alleged incident, prosecutrix was below 16 years of age. She was consenting party. Alleged case of prosecution is highly improbable. Trial Court did not appreciate the evidence in proper perspective. 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.

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 30-9-2006.

6. P.W.1 prosecutrix says in para No.8 of her statement given on oath that her date of birth is 3-4-1991.

7. As per the alleged certificate Ex. P-8 the date of birth of the prosecutrix is 3-4-1991.

8. As per the alleged MLC report Ex. P-16-A prosecutrix was about 14 years old.

9. As per the Dakhil Kharij Panji Ex. D-1 the date of birth of prosecutrix is 13-12-1986.

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. P.W. 1 Prosecutrix does not say the basis for saying the aforesaid date of birth. P.W. 2 Smt. Margret who is mother of the prosecutrix, P.W. 13 Ismel, P.W. 14 Smt. Janmati do not say clearly and strongly about the date of birth of the prosecutrix and reasons therefor.

15. The aforesaid date of birth of prosecutrix mentioned in Ex. P-16-A is based on merely physical examination. It is not based on any scientific or medical test.

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

17. P.W.10 L. Toppo, the then Principal of Middle Higher Secondary School, Balrampur says in para 3 during his cross-examination that this is true that prior to this school, prosecutrix was studying in Primary School, Bathaura.

18. In the case in hand, the prosecution failed to prove the entry of the aforesaid date of birth of prosecutrix in Dakhil Kharij Register of Primary School, Bathaura and also the entry of Declaration Form given at the time of her admission 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 in said Dakhil Kharij register of Primary School, Bathaura to the concerned authority which has been written in the declaration form, as well as in said Dakhil Kharij register, 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. Similarly appellant has also failed to examine the author of Ex. D-1.

19. 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 finds that the appellant does not get any help from Ex. D-1 to assess the age of the prosecutrix at the time of alleged incident. Looking to the aforesaid facts and circumstances and the judicial precedents, this court disbelieves aforesaid statement of P.W. 1 prosecutrix, Ex. P-8, Ex. P-16-A in the reference that on 30-9-2006, prosecutrix was below the 16 years of age.

20. After appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove beyond reasonable doubt that on 30-9-2006 the age of prosecutrix was below 16 years.

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

22. As per the prosecution story, allegedly appellant had said the prosecutrix on 29.09.2006 at about 4:00 p.m. that he will come to her house in the night, but she did not inform her family members as said by him, despite of that fact she was sleeping in her house alone in a room in the night of 30.09.2006. As per the prosecution story P.W. 1 prosecutrix did not say in her statement given on oath that on that day he threatened to kill her, gagged her mouth by his lungi and committed rape with her, instead of it she says in para No.15 during her cross-examination on that date no incident was happened with her.

23. As per prosecution story on 29.09.2006 allegedly after committing rape with prosecutrix appellant had told her that he will again come on next day, she had informed the alleged incident to her Bhabhi Janmati on 01.10.2006, but P.W.-14 Smt. Janmati does not say in her statement given on oath that on 01.10.2006 in the morning, prosecutrix informed her about the incident of 29.09.2006. Moreover, as per the prosecution story the prosecutrix washed her clothes which she wore on 29.09.2006. Moreover, despite of saying by appellant that he will again come on next day prosecutrix was sleeping alone in the room. As per prosecution story on next day's incipient after the first incident she shouted brother Sunil saying that the appellant has come but P.W.-13 Ismel and P.W.-14 Smt. Janmati do not say that while shouting, she had stated the name of appellant.

24. As per the prosecution story, the brothers of the prosecutrix along with their family members were sleeping in the courtyard of the house. Prosecutrix says in para No.10 that in her house first room belongs her Bhabhi. Room of her younger brother and Bhabhi is in another part of the house. P.W.-13 Ismel says in para No.2 that he was sleeping along with his wife in that house. His elder brother Sunil and wife of Sunil were also sleeping in the said house in another room. P.W.-14 Smt. Janmati says in para No. 3 during her cross-examination that this is true that she and her husband, her brother-in-law (Devar) Ismel were also sleeping in that house.

25. P.W.-2 Smt. Margrate says in para No.2 of her statement given on oath that prosecutrix had not told any incident to her. P.W.-1 prosecutrix says in para No.11 that when on 29.09.2006 appellant came first time she had complained to her brother, but this is not the prosecution case. She says in paras No.13, 14 and 15 that her brother and her Bhabhi had seen that the appellant was entering in the house thus her brother closed the room from outside where she was sleeping. On 29.09.2006 the appellant sat for about half an hour. P.W.-13 Ismel says in para No.2 of his statement given on oath that when he came out from his house for urination he saw the prosecutrix and appellant were entering into the house, at that time she shouted. He and Sunil entered in her room and saw that she and appellant were sleeping on a cot, when he inquired her then she told that they were sleeping on a cot with mutual consent. He says in para No.9 during cross-examination that this is true that she was entering in the house taking the appellant. This is true that there was love affair between them. P.W.-14 Smt. Janmati says in para No.2 of her statement given on oath that when she inquired the appellant, he told that the prosecutrix had called him. She says in para No.7 that this is true that the prosecutrix had brought the appellant inside the house by opening the door.

26. As per the MLC report, Ex. P-16(A), P.W.-17 Dr. Saranga Agrawal did not find any injury on the body of prosecutrix. She opined that prosecutrix was habitual for sexual intercourse.

27. Looking to the above mentioned facts and circumstances of the case, this Court finds that prosecutrix was 'Free consenting party'.

28. It has been earlier decided that prosecution has failed to prove beyond reasonable doubt that on 29.09.2006 prosecutrix was below 16 years of age.

29. After appreciation of the evidence discussed herebefore this Court finds that prosecution has failed to prove beyond reasonable doubt the charges punishable under Sections 376(1) & 450 of the IPC against the appellant. Thus, impugned judgment of conviction and order of sentences are set aside. Appellant is acquitted from the charges punishable under Sections 376(1) & 450 of the IPC extending him benefit of doubt.

30. 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.

31. The appellant is on bail. His bail bond shall continue for a further period of six months as per requirement of Section 437-A of the Criminal Procedure Code.

32. Appeal is allowed accordingly.

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