

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.645 of 2002**

Manohar Yadav, son of Roopchand Yadav, aged about 18 years, occupation agriculture (selling milk), resident of Village Bagari, Police Station Rajpur, District Surguja, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh through Police Station Rajpur, District Surguja

--- Respondent

For Appellant	:	Shri Sushil Dubey, Advocate
For Respondent	:	Shri Amit Kumar Verma, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel**Judgment on Board**

12.12.2019

- The instant appeal has been preferred against the judgment dated 30.4.2002 passed by the 1st Additional Sessions Judge, Ambikapur, District Surguja in Sessions Trial No.125 of 2001, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.1,000/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.1,000/- with default stipulation
Under Section 376(1) of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.5,000/- with default stipulation

- Prosecution case, in brief, is that on the relevant date, age of the

prosecutrix (PW2) was about 12 years. She was studying in 6th standard at Kanya Madhyamik Pathshala, Rajpur. As she used to go to the school regularly, on 15.11.2000 also, she went to her school for study, but, thereafter, she did not return home. Her father went to the school, where he came to know that the Appellant had gone to the school and telling in the school that father of the prosecutrix had fallen ill and was admitted in the hospital at Ambikapur, took the prosecutrix away along with him. He made a report (Ex.P6) of missing of the prosecutrix. Thereafter, a milk seller, namely, Rampatiya informed him that he had seen the prosecutrix along with the Appellant at the house of Dhannu Singh. Police reached there and recovered the prosecutrix vide recovery panchnama (Ex.P5). First Information Report (Ex.P10) was recorded. During the course of investigation, statements of the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant. Charges were framed against him.

3. In support of its case, the prosecution examined as many as 13 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded false implication. 3 witnesses have been examined in his defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submits that without there being any clinching evidence on record, the Trial Court has

wrongly convicted the Appellant. With regard to age of the prosecutrix (PW2), her school mark-sheet (Ex.P2) has been produced by the prosecution, but the same has not been duly proved by the competent authority. Apart from the said mark-sheet, no other documentary evidence is available on record in connection with age of the prosecutrix. Jagpatiyabai (PW9), mother of the prosecutrix has categorically stated that the prosecutrix was born 1 year prior to the murder of the then Prime Minister of the country Smt. Indira Gandhi. This means that the prosecutrix was born in the year 1983. Thus, on the date of incident, she was more than 16 years of age. It has been further submitted that according to the radiological report also, age of the prosecutrix was between 13 and 14 years. On consideration of margin of 3 years on higher side, age of the prosecutrix comes to 17 years. From the statement of the prosecutrix, it reveals that she was a consenting party. She visited and stayed at various places along with the Appellant, but she did not disclose about the alleged act. Since she was above 16 years of age, no offence under Sections 366 and 376 of the Indian Penal Code is made out against the Appellant. As regards the offence under Section 363 of the Indian Penal Code, the Trial Court has sentenced the Appellant with rigorous imprisonment for 3 years, but the Appellant has already completed jail sentence of about 4 years.

6. Learned Counsel appearing for the State supports the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record with due care.

8. I shall first consider the evidence available on record regarding age of the prosecutrix. Apart from the mark-sheet (Ex.P2), no other documentary evidence is available with regard to age of the prosecutrix. According to the entries of the mark-sheet (Ex.P2), date of birth of the prosecutrix is 15.7.1988, but on what basis, this date of birth was recorded in the school, no evidence in this regard is adduced by the prosecution. In their Court statements, the prosecutrix (PW2) and her father Sobaran (PW1) and mother Jagpatiyabai (PW9) have not stated anything regarding actual date of birth of the prosecutrix. According to father Sobaran (PW1), age of the prosecutrix was about 12-13 years and according to mother Jagpatiyabai (PW9), age of the prosecutrix was about 14-15 years. In paragraph 7 of his cross-examination, Sobaran (PW1) has admitted that he does not know that in which year the prosecutrix was born. This witness has also not been able to state date or year of birth of his remaining children. Jagpatiyabai (PW9), in paragraph 5 of her cross-examination, has admitted the fact that the prosecutrix was born 1 year prior to the murder of the then Prime Minister of the country Smt. Indira Gandhi. In paragraph 8 also, this witness has admitted that she has also not been able to state date of birth of any of her other children.
9. Dr. M.K. Jain (PW10) is the witness who conducted ossification test of the prosecutrix and opined that age of the prosecutrix was between 13-14 years. His report is Ex.P9.
10. On a minute examination of the evidence available on record with regard to age of the prosecutrix, it is clear that except the mark-sheet (Ex.P2), no other documentary evidence is available. No

dakhil-kharij register, kotwari register or birth certificate has been produced by the prosecution. In the said mark-sheet (Ex.P2) also, on what basis date of birth of the prosecutrix was recorded has not been made clear by the prosecution. Thus, the prosecution does not get any help from the mark-sheet (Ex.P2). Father of the prosecutrix Sobaran (PW1), her mother Jagpatiyabai (PW9) and even the prosecutrix (PW2) herself have not been able to state anything regarding actual date of birth of the prosecutrix. As stated by mother Jagpatiyabai (PW9), the prosecutrix was born in the year 1983. In these circumstances, it seems that on the date of incident, the prosecutrix was about 17 years of age. According to the ossification test report also, age of the prosecutrix was 14 years and on consideration of margin of 3 years on higher side, her age comes to 17 years. Thus, from the evidence available on record, it is well established that on the date of incident, the prosecutrix was more than 16 years of age.

11. Now, I shall examine the conduct of the prosecutrix. According to her, on the date of incident, the Appellant came to her school and told her teacher that her father had fallen ill and he was calling her to Ambikapur. Thereafter, the Appellant took her along with him to Ambikapur by a bus. In paragraph 5 of her cross-examination, she has admitted that the teacher and more than 50 students were present in the class-room at that time, but the prosecution did not make or examine any of them as a witness. According to the prosecutrix, thereafter, the Appellant took her to Ambikapur by a bus and he kept her there in the house of Dhanu for 3 days and there he also committed sexual intercourse with her. She has further deposed that the Appellant had given her there a *saree* and

she had worn that *saree*. In paragraph 11, she has admitted that in that house, family members of Dhanu were also residing. In paragraph 14, she has further admitted that in the house of Dhanu, she used to stay alone for the whole day when the Appellant used to go out for working and she also used to talk with family members of Dhanu. She has further admitted that in the night, the Appellant used to commit sexual intercourse with her and thereafter both used to sleep after wearing their clothes. From the above admissions made by the prosecutrix, it is also well established that she visited and stayed at Ambikapur along with the Appellant for about 3 days. There, both resided at the house of Dhanu and the Appellant used to go out of the house for earning livelihood. Therefore, there was ample opportunity available with the prosecutrix to raise her voice and make a complaint against the Appellant and thereby come out of his clutches, but she did not do so. Thus, it is clear that she was a consenting party to the alleged act.

12. From the above discussion, it is clear that on the date of incident, the prosecutrix was aged about 17 years. She was a consenting party. Therefore, the charges under Sections 366 and 376(1) of the Indian Penal Code are not proved against the Appellant and thus he is acquitted of these two charges. As held above, on the date of incident, age of the prosecutrix was below 18 years and, therefore, the Trial Court has rightly convicted the Appellant for the offence punishable under Section 363 of the Indian Penal Code.

13. For the offence under Section 363 of the Indian Penal Code, the Trial Court has sentenced the Appellant with rigorous

imprisonment for 3 years and fine of Rs.1,000/-, but he is reported to have already completed jail sentence of about 4 years and is presently on bail. In the circumstances, he is not required to be sent back to jail. The fine sentence of Rs.1,000/- is affirmed.

14. Consequently, the appeal is allowed in part to the extent indicated above.
15. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
Judge