

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 543 of 2003

- Sanjay @ Tarkeshwar Sahu, son of Deo Charan Sahu, aged about 23 years, resident of Deo Baloda, District Durg (C.G.)

---- Appellant

Versus

- State of Chhattisgarh, through District Magistrate, Durg, District Durg (C.G.)

---- Respondent

For Appellant : Shri Malay Kumar Bhaduri, Advocate

For Respondent/State : Shri Vikash Shrivastava, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

01.10.2019

1. This appeal arises out of the judgment of conviction and order of sentence dated 26.03.2003 passed by the Fifth Additional Sessions Judge, Durg (C.G.) in Sessions Trial No. 231/2002, whereby, the appellant stands convicted and sentenced as under:-

<u>Conviction:</u>	<u>Sentence:</u>
Under Section 366 of the Indian Penal Code (hereinafter referred to as the 'IPC')	Rigorous imprisonment for three years and pay a fine of Rs. 500/-, in default of payment to further undergo rigorous imprisonment for three months

2. The prosecution case, in brief, is that the prosecutrix (PW-6) resides with her parents in Charoda, Bhilai. On 29.06.2002, First Information Report (FIR – Ex.-P/2) was lodged by the prosecutrix (PW-6) against accused/Appellant Sanjay @ Tarkeshwar Sahu that on 28.06.2002, she had gone to her brother-in-law's house which is situated in Zone-I BMV Charoda for taking cassette. While prosecutrix the was returning to her house at about 05:00 pm, the accused/Appellant came by motorcycle near the railway running room and requested her to sit on the motorcycle for dropping her at her house and the prosecutrix believing the same

sat on his motorcycle. But, instead of taking her to her house, the appellant took her towards Raipur despite her repeated objection. In Raipur the Appellant took the prosecutrix to a garden and asked her for marriage and put vermilion (*Sindoor*) on her hair-parting. Thereafter, Appellant Sanjay came to his house at Bilaspur with the prosecutrix and committed sexual intercourse with the prosecutrix. In Bilaspur Appellant introduced the prosecutrix to his neighbour Sohan Sahu (PW-1) as his sister-in-law. On the next day morning i.e. 29.06.2002 prosecutrix asked the Appellant/accused to drop her at Bhilai Station and prosecutrix thereafter came to her house and narrated the incident to her mother Usha Rani (PW-5). Therefore, FIR (Ex.-P/2) was lodged on 29.06.2002 against the Appellant/accused under Sections 363, 366, 376 & 506B of IPC in police station GRP, outpost Charoda, Durg.

3. After investigation, the charge-sheet was filed against the accused/Appellant under Sections 363, 366, 376 & 506B of IPC and while framing the charges, the learned Fifth Additional Sessions Judge, Durg (C.G.) framed the charge under Sections 363, 366 & 376 of IPC.

4. So as to hold the accused/appellant guilty, the prosecution examined 7 witnesses i.e. Sohan Sahu (PW-1), Dr. A.K. Sahu (PW-2), Shivkumar Pandey (PW-3), Yogendra Pandey (PW-4), Smt. Usha Rani (PW-5), prosecutrix (PW-6) and Dr. (Smt.) Mamta Pandey (PW-7). Statement of the accused/Appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

5. After appreciation of the evidence available on record, the learned Fifth Additional Sessions Judge, Durg by the impugned judgment convicted and sentenced the accused/Appellant as mentioned in para- 1 of this judgment. However, the accused/Appellant is acquitted of the charges levelled against him under Sections 363 & 376 of IPC, hence this appeal.

6. Learned counsel for the Appellant vehemently argued that the prosecution

has not been able to establish by adducing cogent and reliable evidence that the prosecutrix was minor on the date of the incident. He submits that the prosecutrix (PW-6) had gone with the Appellant on his motorcycle from Bhilai to Raipur and from Raipur to Bilaspur, therefore, her conduct clearly shows that she was the consenting party and stayed one night at Bilaspur with the Appellant. In these circumstances, conviction of the Appellant under Section 366 of IPC is not sustainable and he deserves to be acquitted of the said charge.

7. On the other hand, counsel for the Respondent/State supports the judgment impugned. It has been argued by the State counsel that the conviction of the Appellant is in accordance with law and there is no infirmity in the same.

8. Heard the counsel for the respective parties and perused the evidence on record.

9. As per ossification Test (Ex.-P/1) conducted by PW-2 Dr. A.K. Sao, the prosecutrix was found to be aged about 17 years and as per deposition of PW-2, there can be variation of three years on either side. If the margin of three years is taken on upper side, the age of the prosecutrix comes to 20 years. PW-5 Usha Rani, mother of the prosecutrix, has though stated that on the date of incident, the age of the prosecutrix was about 17 years but no any specific date regarding birth of prosecutrix is deposed by PW-5. Neither school register has been produced before the trial Court nor the *kotwari panji register* seized by the investigating officer regarding age of the prosecutrix (PW-6).

10. After careful consideration and scrutiny of the statements of mother of the prosecutrix as also the Doctor (PW-2), this Court is unable to accept the findings of the Trial Court that the prosecutrix was 17 years of age on the alleged date of the incident.

11. The evidence adduced by the prosecution is not sufficient to come to the conclusion that the prosecutrix was minor or below 18 years of age on the date of the incident.

12. According to the statement of the prosecutrix (PW-6), in the month of June,

2002, she was abducted by the accused/Appellant from Bhilai, from where, the Appellant had taken her in a garden at Raipur and asked for marriage and then put vermilion (*Sindoor*) on her hair-parting. Thereafter, Appellant Sanjay came to in his house at Bilaspur with the prosecutrix and she stayed in the company of accused appellant one night where appellant committed sexual intercourse twice and threatened her not to disclose all these facts to anybody. On next morning i.e. 29.08.2002, the appellant along with his friend Sohan Sahu (PW-1) dropped the prosecutrix at Bhilai Station. The FIR (Ex.-P/2) was lodged on 29.06.2002 by the prosecutrix (PW-6) against the Appellant.

13. PW-5 Usha Rani, mother of the prosecutrix, states that the prosecutrix (PW-6) left her home on 28th June and she (prosecutrix) returned after 3-4 days and the boy who had taken the prosecutrix, brought the prosecutrix at Bhilai. PW-5 states that the prosecutrix informed her (PW-5) that Appellant Tarkeshwar had told the prosecutrix that he would drop her at her house, but the appellant did not do so, took her to Raipur and thereafter the Appellant took the prosecutrix to his home at Bilaspur.

14. PW-1 Sohan Sahu admits in para-3 that no any incident was narrated by the prosecutrix that she was abducted by the Appellant. He (PW-1) and Appellant had left the prosecutrix in railway station. He also admits that both (Appellant and prosecutrix) were having normal behaviour and conduct. He admits that the Appellant introduced the prosecutrix to him (PW-1) as his sister-in-law.

15. The prosecutrix (PW-6) was in the company of Appellant Sanjay @ Tarkeshwar Sahu for about two days and visited several place i.e. from Bhilai to Raipur and thereafter Bilaspur where she stayed one night in the house of Appellant. During this period, when the Appellant was going on a motorcycle with the prosecutrix, the prosecutrix did not raise any alarm whereas she (prosecutrix) had sufficient time and opportunity to complain about her forcible kidnapping/abduction but she did not do so. Apart from this, the Appellant had taken the prosecutrix (PW-6) on 28.06.2002 and the prosecutrix returned to her house on 29.06.2002, narrated the

incident to her mother (PW-5), FIR was lodged on 29.06.2002 and the evidence of PW-5, mother of the prosecutrix, was that the prosecutrix returned to her house after 3-4 days which runs contrary to the material on record. Therefore, in the opinion of this Court, from the conduct of the prosecutrix (PW-6), it could safely be inferred that she was the consenting party. The prosecution is not able to adduce positive, cogent and reliable evidence about her age, hence, the Appellant is entitled to get benefit of doubt.

16. For the foregoing reasons and discussions, the appeal is allowed. The conviction and sentence of Appellant under Section 366 of IPC are set aside and he is acquitted of the said charge. If fine amount has been deposited, the same be returned to the Appellant.

17. It is also stated that the accused/Appellant is on bail since 24.06.2003, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437-A of Cr.P.C.

Sd/-
(Gautam Chourdiya)
Judge