

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.881 of 2017

Judgment Reserved on : 8.8.2019

Judgment Delivered on : 7.11.2019

Tilak Das Verma, son of Gautam Das Verma, aged about 25 years, r/o Azad Chowk, Ward No.12, Ghumka Police Station, Ghumka, District Rajnandgaon, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through the Police Station Ghumka, District Rajnandgaon, Chhattisgarh

--- Respondent

For Appellant : Shri Goutam Khetrapal and Shri Kapil Maini, Advocates
For Respondent : Smt. Smriti Shrivastava, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 16.5.2017 passed by the Additional Sessions Judge (FTC), Rajnandgaon in Sessions Trial No.40 of 2016, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 450 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.2,000/- with default stipulation
Under Section 376(2)(ढ) of the Indian Penal Code	Rigorous Imprisonment for 10 years and fine of Rs.3,000/- with default stipulation
Under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the Act')	Rigorous Imprisonment for 10 years and fine of Rs.3,000/- with default stipulation

2. As per the prosecution story, on the relevant date, age of the prosecutrix (PW2) was 17 years and 3 months. Her date of birth is 12.3.1999. She was residing with her maternal grandfather Gopal Das (PW5) at Village Ghumka. Allegedly, between the period January, 2016 and March, 2016, the present Appellant visited the prosecutrix at her house frequently and commit sexual intercourse with her there on the pretext that he will marry her and as a result of which she conceived and was carrying pregnancy of about 3 months. Thereafter, she narrated the entire incident to her relatives. A social meeting was also convened and thereafter First Information Report (Ex.P11) was lodged by her maternal grandfather Gopal Das (PW5) on 12.7.2016. An offence was registered and during the course of investigation, both the prosecutrix and the Appellant were medically examined. Dr. Ekta Daniel (PW12) examined the prosecutrix and gave her report (Ex.P6). Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. With regard to date of birth of the prosecutrix, a progress report (school mark-sheet) (Ex.P5) of the prosecutrix was seized. Dakhil-kharij register (Ex.P9) was also seized. On completion of the investigation, a charge-sheet was filed. Charges were framed against the Appellant for offence punishable under Sections 366, 376(2)(ढ) and 450 of the Indian Penal Code and Section 6 of the Act.
3. In support of its case, the prosecution examined as many as 16 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded innocence. No witness has been examined in his defence.

4. On completion of the trial, vide the impugned judgment, the Trial Court acquitted the Appellant of the charge framed under Section 366 of the Indian Penal Code, but convicted and sentenced him as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that without there being any clinching evidence on record against the Appellant, the Trial Court has wrongly convicted him. The statement of the prosecutrix is suspicious and not reliable. It was submitted that from the statement of the witnesses, it is established that there was a grave enmity between the families of the prosecutrix and the Appellant and, therefore, the Appellant has been falsely implicated. It was further submitted that even if the entire evidence is taken as it is, it seems that the prosecutrix was a consenting party. There is no clinching evidence on record with regard to age of the prosecutrix, which shows that on the date of incident her age was not below 18 years. Though in the dakhil-kharij register (Ex.P9), date of birth of the prosecutrix is mentioned as 12.3.1999, as stated by Gopal Das (PW5), maternal grandfather of the prosecutrix, relevant entries in the school were got recorded by mother of the prosecutrix, but she has not been examined by the prosecution. Gopal Das (PW5) has also stated that they used to get recorded entries regarding birth of the children in the kotwari register, but no kotwari register has been produced by the prosecution before the Trial Court. Dr. Ekta Daniel (PW12) had also advised for ossification test for the purpose of determination of age of the prosecutrix, but the prosecution has not done so. Therefore, it is not established that on the date of incident, the

prosecutrix was below 18 years. It was further submitted that the prosecutrix disclosed the incident only when she was carrying pregnancy of about 3 months. She she was a consenting party and, therefore, no offence is made out against the Appellant. It was also submitted that though the Trial Court has held that the consent was given by the prosecutrix on the pretext of marriage, there is no clinching evidence on record in this regard. Therefore, the conviction of the Appellant is not sustainable.

6. Learned Counsel appearing for the State/Respondent supported 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. With regard to age of the prosecutrix, the Trial Court has relied upon the entries of dakhil-kharij register (Ex.P9) and arrived at the conclusion that date of birth of the prosecutrix is 12.3.1999. In this regard, Devikumar Verma (PW4), a teacher of the Government Girls School, Ghumka has admitted that the entries were not made by him in the dakhil-kharij register (Ex.P9). He has also admitted that on what basis the said entries were made is not known to him. In this case, mother and father of the prosecutrix have not been examined by the prosecution.
9. Gopal Das (PW5), maternal grandfather of the prosecutrix has stated that the prosecutrix was living with him from her childhood. In paragraph 18 of his cross-examination, he has also stated that the birth of the prosecutrix had taken place at his house. He has further stated that whether the entry of birth of the prosecutrix was

got recorded in kotwari register or in police station is not known to him. He has also admitted that he does not know date of birth of the prosecutrix. As stated by this witness, admission of the prosecutrix in the school was got done by her mother. But, mother of the prosecutrix has not been examined by the prosecution. Dr. Ekta Daniel (PW12) had advised for ossification test of the prosecutrix for determination of her age, but the test was not got done by the prosecution for the reasons best known to them.

10. From the evidence available on record, it is clear that with regard to date of birth of the prosecutrix, only the entries of the dakhil-kharij register (Ex.P9) and the progress report (Ex.P5) of the prosecutrix are available. The entries in the dakhil-kharij register were got recorded by mother of the prosecutrix, but she has not been examined by the prosecution. Who recorded the entries in the dakhil-kharij register has not been revealed by the prosecution. Gopal Das (PW5), maternal grandfather of the prosecutrix does not know date of birth of the prosecutrix. Even after the advice of Dr. Ekta Daniel (PW12), ossification test of the prosecutrix for determination of her age was not got done by the prosecution. In these circumstances, only on the basis of the entries in the dakhil-kharij register, it would not be in the interest of justice to accept the date of birth of the prosecutrix to be 12.3.1999. Thus, the prosecution has failed to prove that on the relevant date, the age of the prosecutrix was below 18 years.

11. As regards the alleged incident, the prosecutrix (PW2) has stated in her Court statement that the Appellant lived in her neighbourhood. Whenever she was alone at her house, the

Appellant used to come to her and on the pretext that he will marry her he used to commit sexual intercourse with her. He committed wrong with her 5-6 times and, therefore, she became pregnant. But, she did not come to know about her pregnancy and she only came to know about her pregnancy when she visited a doctor after stoppage of her menstruation and thereafter she narrated the entire incident to her family members. A social meeting was also convened in which the Appellant refused to marry her. Thereafter, the matter was reported. In her cross-examination, in paragraph 13, she has admitted that when the Appellant came to her at her house for the first time and committed wrong with her, at that time, she did not disclose the incident to anyone. She also did not shout nor did she go out of her house on that day. She has further stated that the Appellant used to come to her at her house daily and spend 2-3 hours with her. But, she never disclosed about this to any of her family members. In paragraphs 16 and 17, she has further admitted that her family members had asked her frequently for many days about her pregnancy. When this fact spread in the whole village thereafter the social meeting was convened. She has further admitted that in the social meeting the Appellant refused that she was pregnant from his side. On this, a quarrel took place in the said meeting and thereafter the meeting ended. In paragraphs 11, 12 and 18 of her cross-examination, she has further admitted that the Appellant is her relative and their houses are situated adjacent to each other's house. Their families are not on talking terms for many years and their family members do not visit to each other. Quarrels take place some times between their family members and none of their family members want to see each other. Revati Verma (PW1), daughter-in-law of Gopal Das

(PW5), Gopal Das (PW5), maternal grandfather of the prosecutrix and Chandra Kumar Verma (PW8), maternal uncle of the prosecutrix have also admitted these facts that both the family members are not on talking terms, quarrels take place some times between them and none of them want to see each other. In these circumstances, the statement of the prosecutrix that the Appellant used to visit her daily at her house and spend 2-3 hours with her there is not reliable.

12. As stated by the prosecutrix (PW2) as well as Revati Verma (PW1), when Revati Verma (PW1) took the prosecutrix to a doctor, at that time, the fact of pregnancy of the prosecutrix disclosed and then the prosecutrix narrated about the incident to her family members. But, Gopal Das (PW5), maternal grandfather of the prosecutrix has deposed that one day in the night when he did not find the prosecutrix at home, he went out for her search and when he reached to the *kotha* where cows were kept he heard there loud voices of a boy and a girl. At that time, the girl was saying to the boy that he had told her that he will marry her and she has become pregnant. Thereafter, when the prosecutrix returned home, at that time, on being asked, she told that the Appellant had developed physical relationship with her. But, all these facts stated by Gopal Das (PW5) before the Court are not mentioned in his case diary statement nor are mentioned in the FIR (Ex.P11) lodged by him. Thus, it is clear that due to enmity with the Appellant, this witness has developed his statement in the Court and stated contrary to his case diary statement. This witness, in paragraph 12 of his cross-examination, has stated that father of the Appellant is his real brother and thus the Appellant is his nephew and the prosecutrix is

daughter of daughter of this witness. Therefore, mother of the prosecutrix becomes close cousin sister of the Appellant. In these circumstances, looking to the aforesaid relationship and grave enmity, the prosecutrix would have given her consent to the Appellant for sexual intercourse with her on the pretext by the Appellant that he will marry her is not acceptable.

13. On a minute examination of the above evidence available on record, it is clear that on the date of incident the prosecutrix was below 18 years is not established beyond reasonable doubt. From the statement of the prosecutrix, it is also clear that there are contradictions in her statement on material points. Even if her statement is taken as it is, she seems to be a consenting party. As stated by her, she had given her consent on the pretext of marriage, but looking to the family relationship between her and the Appellant as also the enmity between their family members, her consent was on the pretext of marriage is not established. In these circumstances, no offence is made out against the Appellant.
14. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charges framed against him.
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