

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 422 of 2013**

- Hemant Patel S/o Samlal Patel, Aged About 40 Years, R/o Jhurhatola, P.S. Doundi, District Durg C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Station House Officer, Police Station Doundi, District Durg C.G. , Chhattisgarh

---- Respondent

For Appellant : Shri Goutam Khetrapal, Advocate.

For Respondent/State: Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant
Judgment on Board

17/01/2019

1. This appeal has been preferred against judgment dated 18-01-2013 passed in Sessions Trial No.44/2012 by the Additional Sessions Judge, Balod, District Durg, C.G. convicting the appellant under Section 363, 366 and 376(1) of the IPC and sentencing him with R.I. for 7 years, R.I. for 7 years and R.I. for 10 years along with fine Rs.50/-, Rs.50/- and Rs.50/- with default stipulations and direction that all the jail sentences shall run concurrently.
2. The prosecution case, in brief, is this, that the appellant allured the minor prosecutrix (PW-2) with false promise to marry her and abducted her on 28-08-2009. The appellant took the prosecutrix to Chandrapur, Maharashtra where while staying for a couple of days he had sexual intercourse with the minor prosecutrix regularly. Father of the prosecutrix, Punaram (PW-3) filed a missing report on 04-09-2009. Thereafter, in the search made the prosecutrix was

recovered from the custody of the appellant on 29-09-2009 in Chandrapur Maharashtra vide Ex.-P/1. Thereafter, on the basis of the statement given by the prosecutrix the offence was registered against the appellant by lodging the FIR Ex.-P/2. After completion of the investigation charge sheet was filed before the concerned Court.

3. The appellant was charged with offence under Sections 363, 366, 376(1) of the IPC, to which he denied and prayed for trial.
4. After completion of the prosecution evidence, the appellant was examined under Section 313 of the Cr.P.C., in which he denied all the incriminating evidence against him, pleaded innocence and false implication. No witness was examined in defence.
5. After completion of the trial, the impugned judgment has been passed wherein the appellant has been convicted and sentenced as aforementioned.
6. Learned counsel for the appellant submits that the appellant has been erroneously convicted by the trial Court without there being cogent and reliable evidence of the prosecution. Although the prosecutrix has made statement that she did not consent for the physical relation, but her conduct speaks that she was a consenting party. The learned Court below has erred in holding that the prosecutrix was unable to give consent for physical relation and it relied upon the amended provision of the IPC, which has come into force from February, 2013, whereas, the incident had taken place in the year 2009 and at that time according to the existing provision of law, the age of consent was 16 years and above, which was present in this case. Therefore, the appellant had been entitled for acquittal,

hence, it is prayed that the appeal may be allowed and the appellant may be acquitted.

7. Learned counsel for the State/respondent opposes the grounds raised in the appeal and the submission made in this respect and submits that the prosecution has proved its case beyond reasonable doubt. The prosecutrix (PW-2) has clearly stated before the Court that she had never consented for physical relation and she was continuously put under threat by the appellant, because of which she was unable to resist or raise alarm. Therefore, it is a clear case where the prosecutrix was subjected to sexual intercourse by force which amounts to commission of offence of rape. Therefore, it is prayed that the appeal may be dismissed.
8. Heard learned counsel for the parties and perused the record of the trial Court.
9. The prosecutrix (PW-2) has stated that in the month of August 2009 the appellant by putting her under threat took her to Chandrapur, Maharashtra where she stayed for almost a month in a rented house, while her stay there the appellant established physical relation with her on a number of occasions by putting her under threat again and again. Later on, her father arrived at Chandrapur, Maharashtra and she narrated to him about the incident. She has stated that while leaving her village she did not inform anybody and she went on foot to another village where she and the appellant got a bus to travel. She has admitted that having all the opportunity of disclosing about the incident or raising alarm she did not avail of the same and inform anybody that she was being abducted. She has

also admitted that while residing at Chandrapur she had occasions to inform, but again she did not inform about her plight to anybody, to which she has explained, that she conducted herself in that way because she was under the threat given by the appellant.

10. Punaram (PW-3) is father of the prosecutrix (PW-2) who has narrated about the incident according to the information given to him by his daughter and he has lodged the FIR Ex.-P/2.
11. The appellant has made no specific case of denial of having physical relation with the prosecutrix, therefore, there is no need to appreciate other evidence present on the record in this respect. It is held that the appellant and the prosecutrix both had physical relation while they were residing at Chandrapur, Maharashtra for a month.
12. The statement made by the prosecutrix (PW-2) is this that she was under the threat continuously, but, she has not made clear that in what manner she felt threatened, when she had number of opportunities why she did not speak about her plight to any of the persons she came into contact with. The prosecutrix (PW-2) was also confronted with her previous statement Ex.-P/6 compared to which it appears that there is some improvements made by her in her Court statement. Therefore, the statement given by the prosecutrix (PW-2) appears to be in two folds, on the one side she has stated that she had never consented for physical relation, but on the other side, she never objected or raised alarm or tried to make her escape, whereas, there were enormous opportunities to do so.

13. The conduct of the prosecutrix (PW-2) reflects that she was a consenting party. The prosecutrix (PW-2) has made statement that her date of birth is 30-05-1993, which has not been challenged in her cross-examination.
14. Doulatram Sahu (PW-6), In-Charge Principal of the School at Kuagodi, has stated before the Court that on the basis of school register Ex.-P/13 the date of birth recorded in the school register of the prosecutrix is 03-05-1993. On that basis the age of the prosecutrix was 16 years and 3 to 4 months which is not being disputed by the appellant side.
15. Considered on the submission of the counsel for the appellant that the prosecutrix being a consenting party, on the date of incident, the sexual relation of the appellant and the prosecutrix does not amount to offence in accordance with existing provisions of the IPC on that date, as prior to the amendment that has been incorporated in the IPC which has come to effect from 03-02-2013, the age of giving consent for physical relation by a girl was 16 years according to the 6th explanation of Section 375 of the IPC. Therefore, in this circumstance it can be held that the physical relation of the appellant and the prosecutrix did not amount to commission of offence of rape. It appears that the trial Court has committed error in this respect which needs rectification in this appeal.
16. Conviction of the appellant under Section 366 of the IPC also would not stand as the sexual relation of the appellant and the prosecutrix was not an offence, therefore, there is no evidence forcing that the prosecutrix was submitted to physical relation without her

willingness and consent. However, conviction of the appellant under Section 363 of the IPC would be maintainable because the person who is removed from the lawful guardianship has to be of age below 18 years, which is present in this case because the prosecutrix is just of age about 16 years and had not completed 18 years of age.

17. Therefore, after considering all the facts, circumstances and evidence of this case, the appeal is allowed in part. Conviction of the appellant under Section 366 and 376(1) of the IPC are set aside. However, conviction of the appellant under Section 363 of the IPC is maintained. As submitted that the appellant is in jail since the date of his arrest, i.e., 14-09-2012 and has completed sentence of imprisonment of more than 6 years in jail, therefore, I feel inclined to reduce the sentence of imprisonment imposed upon him, hence, the appellant is sentenced with the rigorous imprisonment of the period of detention already undergone by him in jail for the offence he has been convicted in this judgment.

18. The appeal stands disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge