

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 848 of 2015**

Kamlesh Sahare S/o Shyam Lal Sahare Aged About 19 Years R/o Indira Nagar, Supela, District Durg Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh S/o Through P.S. Supela Civil And Revenue District Durg Chhattisgarh.

---- Respondent

For Appellant	:	Shri Uttam Pandey, Advocate.
For Respondent/ State	:	Shri Samdarsh Nirankari, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****25/04/2019**

Heard.

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 24.9.2014 passed by Learned Special Judge (constituted under the Protection of Children from Sexual Offences Act, 2012) and the Learned Additional Sessions Judge (FTC) Durg, District Durg, Chhattisgarh in Sessions Trial No. 44 of 2013 whereby and whereunder the learned Additional Sessions Judge after holding the appellant guilty for the offences under Section 450 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012, sentenced him to undergo rigorous imprisonment for 4 years and 10 years and to pay fine of Rs.5,000/- and Rs.5,000/-, in default of payment of fine, to further undergo additional rigorous imprisonment for 6 months and 1 year, respectively with a direction that both the substantive jail sentences shall run concurrently.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

(3) As per case of the prosecution, in brief, on 3.1.2013, when the minor prosecutrix (PW-8) was all alone in her residence, the appellant committed house trespass in her residence and then taking her by force committed the offence of rape with her and thereafter, he also threatened her. The prosecutrix (PW-8) informed about this incident to her parents in the evening and thereafter, the FIR Ex.P/11 was lodged in the police station. The prosecutrix (PW-8) was medically examined and the appellant was medically examined as well.

(4) Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court. The appellant was charged for the offences under Sections 450 and 506 part II of the IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012. He denied the charges and prayed for trial.

(5) In order to prove the guilt of the appellant, the prosecution examined 10 witnesses. 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 in the crime in question. No witness was examined in defence.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellant as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned counsel appearing on behalf of the appellant submits that the conviction against the appellant is without support of evidence of the prosecution beyond reasonable doubt, hence, it is bad in law. Firstly, the statements of the prosecutrix (PW-8) herself and Hemlata (PW-10) clearly demonstrate that the prosecutrix (PW-8) was a consenting party and she was having physical relation with the appellant and when Hemlata (PW-10) came to her house and discovered about it, a false allegation has been made against the appellant. With regard to age, the prosecution has not brought any reliable evidence. The prosecutrix (PW-8) herself has stated that she is 17 years. Her father Nandu Yadav (PW-4) has stated that her daughter is 16 years of age and her step mother Baisakhin Bai (PW-9) has also stated about an approximate age. Nandu Yadav (PW-4), father of the prosecutrix has clearly admitted that he has not informed about the date of birth to the Municipal Council or the Municipality. No evidence of school entry has been produced by the prosecution. On the other hand, Dr. A.K. Sahu (PW-6), the Radiologist has clearly opined that the age of the prosecutrix (PW-8) was between 18 to 19 years therefore, it is a clear case of consent and that the prosecutrix (PW-8) was capable to give such consent. Hence, it is

prayed that on these grounds, the appeal may be allowed and the appellant may be acquitted of the charges framed against him.

(9) Per contra, learned counsel for the respondent/ State opposed the prayer and submission. It is submitted that the statement of the prosecutrix (PW-8) is very clear that she was taken by force and raped by the appellant. He also submitted that the parents of the prosecutrix (PW-8) have authority to make a statement about her age and further, no question has been put to them in cross-examination to dispute the age of the prosecutrix (PW-8) which had been stated by them. Hence, there is no scope for interference in the impugned judgment.

(10) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(11) The point in issue in this appeal is whether the prosecution has proved the charges against the appellant on the basis of the evidence beyond reasonable doubt?

(12) Firstly, the ground of consent is taken into consideration. The only witness in this case is the prosecutrix (PW-8) herself who has though stated in her examination-in-chief that the appellant committed house trespass and raped her, but then she herself stated in her cross-examination that at the time of incident Hemlata (PW-10) had come to her house for borrowing incense sticks; as the door was closed, on her knocking she has opened the door and given incense sticks and at that

time she was without her lower apparel and then she informed Hemlata (PW-10) that the appellant had raped her. In cross-examination, she denied all the adverse suggestions given in defence. However, she has admitted that she lodged FIR on the advice given by one Janki Bai.

(13) Hemlata (PW-10) has stated that on the date of incident she had been to the house of the prosecutrix (PW-8) and after calling her when she did not open the door, she peeped from the space beneath the door and saw that the appellant was running away towards bathroom and then the prosecutrix (PW-8) opened the door and by that time the appellant had fled from her house. She has denied in her cross-examination that the prosecutrix (PW-8) stated nothing about the rape committed with her. The witness was declared hostile and in cross-examination by the prosecutor, she has admitted that she was told by the prosecutrix that the appellant after putting the prosecutrix (PW-8) under threat had forcefully raped her. She has also admitted that she was the person who informed about the incident to Nandu Yadav (PW-4) and Baisakhin Bai (PW-9), the father and mother of the prosecutrix (PW-8). In cross-examination, some improvement has been established in her Court statement compared to her previous statement Ex. D/3 which is of no consequence. The importance of her statement is that she was the person who came on the spot when the incident was taken place and had discovered about it and then she was informed by the prosecutrix (PW-8) that she had been raped.

(14) Dr. Babita Saxena (PW-2) is the examining doctor, who had on

examination of the prosecutrix (PW-8) has not found any injury on her body and on her private parts. On the contrary, she was found habitual for sexual intercourse and no opinion was given about recent sexual intercourse to have happened with her. Therefore, on the basis of the statement of the examining doctor, it can be held that there was no injury found on the body of the prosecutrix (PW-8) to suggest that there had been any struggle or any resistance by the prosecutrix (PW-8).

(15) After closely scrutinizing the evidence of the main witnesses in this case as aforementioned, some circumstances are there which indicate that it may be a matter of consent. Firstly, when Hemlata (PW-10) came to the spot the door was closed from inside and the prosecutrix (PW-8) opened the door after the call or after knocking. It is the admission of the prosecutrix (PW-8) that she was not wearing the apparel on the lower part of the body when she opened the door. Secondly, the appellant had made his escape before Hemlata (PW-10) could see him and thirdly, it is the statement made by Hemlata (PW-10) that she was the person who informed about the incident to the parents of the prosecutrix (PW-8). Therefore, these circumstances are quite suggestive that it may be a matter of consent, as such, the denial of consent by the prosecutrix (PW-8) herself in her statement does not inspire confidence.

(16) Another point raised that the prosecutrix (PW-8) was not a minor on the date of incident, is examined and considered. It is simply an oral statement made by the prosecutrix (PW-8) that she is 17 years old. Her father Nandu Yadav (PW-4) has stated that her daughter is 16 years old

and he has not made any statement regarding her date of birth or year of birth and has also stated that he never informed the Municipality or other office regarding the birth of his child/ the prosecutrix (PW-8). Similarly, Baisakhin Bai (PW-9) is step-mother of the prosecutrix (PW-8). She is also not aware of the exact age of the prosecutrix (PW-8). Therefore, the statement made by these witnesses is only on the basis of the approximation and there is no exactness. Further, Nandu Yadav (PW-4) being the parent of the prosecutrix (PW-8) can be regarded as authority to know about the age of the prosecutrix (PW-8) if there is no other evidence to challenge it.

(17) The statement of Dr. A.K. Sahu (PW-6), the Radiologist is that the age of the prosecutrix (PW-8) on the basis of the radiological examination was 18 to 19 years vide his report Ex. P/21 which is highly contradictory to the statement made by the prosecutrix (PW-8) herself and her father Nandu Yadav (PW-2). Otherwise, the age of prosecutrix (PW-8) as stated is on the margin of the majority therefore, on the basis of the contradictory report of the Radiologist, I am of this view that there is no clear and cogent evidence in this case to hold it on a very clear basis that the prosecutrix (PW-8) was minor of aged below 18 years on the date of incident. Therefore, the prosecution has failed to prove this case on this point as well.

(18) After a close scrutiny of the evidence present in this case and the findings arrived at as mentioned herein-above, I am of this opinion that the conviction of the appellant under Section 4 of the POCSO Act is bad

in law. However, looking to the presence of the evidence for the offence under Section 450 of the IPC, I am of the view that the trial Court has not committed any error regarding conviction of the appellant for this offence.

(19) After due consideration, the appeal is allowed in part and the conviction and sentence under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is set aside and the conviction and sentence under Section 450 of the IPC is maintained. As the Court below had ordered that the sentence will run concurrently, it can be presumed that the period of sentence has been already undergone by him for the conviction that has been maintained by this Court. The fine sentence awarded by the trial Court is also modified and reduced. Now, the appellant shall pay fine of Rs.1,000/- only and in default of payment of fine, he shall further undergo additional RI for two months.

(20) Accordingly, the appeal is partly allowed.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE