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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.514 of 2013

Judgment Reserved on : 13.9.2019

Judgment Delivered on : 12.12.2019

Smt. Sheela Banjare, wife of Naresh Banjare, aged about 30 years, resident of Kosmarra, Bhakhara, Revenue District Dhamtari, Civil District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Darri, District Korba, Chhattisgarh

--- Respondent

Criminal Appeal No.515 of 2013

Panchanand Mahanand, son of Jagdish, aged about 35 years, resident of Udiya Basti, Rajiv Nagar, Darri, P.S. Darri, Revenue and Civil District Korba, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Darri, District Korba, Chhattisgarh

--- Respondent

and

Criminal Appeal No.717 of 2013

Bairagi Prasad, son of Panchami Prasad Satnami, aged about 26 years, resident of Udiya Basti, Rajiv Nagar, Darri, P.S. Darri, Revenue and Civil District Korba, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Darri, District Korba, Chhattisgarh

--- Respondent

For Appellants	:	Shri Sumit Singh Rathore and Ms. Rashmi Sen, Advocates
For Respondent	:	Shri Alok Nigam, Government Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. Since all the three appeals arise out of a common judgment, they are decided together.
2. The appeals are directed against the judgment dated 29.5.2013 passed by the Additional Sessions Judge, Katghora, Korba in Sessions Trial No.85 of 2012, whereby the Appellants have been convicted and sentenced as under:

<u>Appellant</u>	<u>Conviction</u>	<u>Sentence</u>
Appellant Smt. Sheela Banjare	Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.500/- with default stipulation
Appellant Panchanand Mahanand	Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 2 years and fine of Rs.500/- with default stipulation
	Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.500/- with default stipulation
Appellant Bairagi Prasad	Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 2 years and fine of Rs.500/- with default stipulation
	Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 5 years and fine of Rs.500/- with default stipulation
	Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 10 years and fine of Rs.1,000/- with default stipulation

3. Facts of the case, in brief, are that on the relevant date, age of the prosecutrix (PW1) was about 12 years. On 20.2.2012, Baghel Bagh (PW2), father of the prosecutrix lodged a report of missing of

the prosecutrix that she was missing since 19.2.2012 7:00 p.m. It was also informed by him that Appellant Bairagi Prasad, who was a resident of his locality, had also disappeared. This information was recorded in Rojnamcha Sanha (Ex.P20). On 21.2.2012, First Information Report (Ex.P21) was also lodged by Baghel Bag (PW2) in which he suspected that the prosecutrix would have run away with Appellant Bairagi Prasad. On 8.5.2012, the prosecutrix met. Her recovery panchnama (Ex.P9) was prepared. Her statement was recorded in which she disclosed that Appellants Panchanand Mahanand and Bairagi Prasad had forcefully abducted her and taken her away in an auto of Dharmendra Kumar Choudhary (acquitted accused). Thereafter, Appellant Bairagi took her to the house of Appellant Sheela Banjare. Thereafter, he took her to different places and kept her there. During this period, he continued to commit forcible sexual intercourse with her. She was medically examined by Dr. V. Rawte (PW6). Her report is Ex.P7 in which it was found that hymen of the prosecutrix was old ruptured and her vagina was admitting one finger. It is reported that sexual intercourse was done with the prosecutrix, but no definite opinion could be given regarding recent sexual intercourse with her. Statements of other witnesses were also recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed. Charges were framed against the accused persons.

4. To rope in the accused persons, the prosecution examined as many as 7 witnesses. Statements of the accused persons were also recorded under Section 313 the Code of Criminal Procedure in which they denied the guilt and pleaded innocence. No witness

has been examined in their defence.

5. On completion of the trial, the Trial Court acquitted accused Dharmendra of all the charges, but convicted and sentenced the present Appellants as mentioned in the second paragraph of this judgment. Hence, these appeals.
6. Learned Counsel appearing for the Appellants argued that the Appellants have wrongly been convicted by the Trial Court without there being sufficient evidence against them on record. It was further argued that it has not been established by the prosecution that on the date of the alleged offence, age of the prosecutrix was below 18 years. Though photo copy of dakhil-kharij register has been submitted by the prosecution before the Trial Court, statement of the person who made the relevant entries in the said register has not been recorded. On what basis the said entries were made in the register has also not been explained by the prosecution. The examining doctor had advised for ossification test of the prosecutrix for determination of her age, but the prosecution has not done so for the reasons best known to them. From the statement of the father of the prosecutrix, it seems that on the date of alleged incident, the prosecutrix was above 18 years of age. From the statement of the prosecutrix also, it is well established that she was a consenting party to the act committed with her. In these circumstances, conviction of the Appellants is not sustainable.
7. On the contrary, Learned Counsel appearing for the State supported the impugned judgment of conviction and sentence.
8. I have heard Learned Counsel appearing for the parties and

perused the material available on record minutely.

- 9.** I shall first consider the evidence available on record which relates to age of the prosecutrix. In this case, only one documentary evidence is available on record with regard to age of the prosecutrix, which is a photo copy of dakhil-kharij register (Article A). According to the entries of the said register, date of birth of the prosecutrix is 7.12.2000. On what basis these entries were made and who made the entries in the register is not mentioned. The person who made these entries has also not been examined by the prosecution. Original dakhil-kharij register has also not been produced and compared with the photo copy thereof.
- 10.** Dr. V. Rawte (PW6), who medically examined the prosecutrix, had advised for ossification test of the prosecutrix for determination of her age, but, despite that, the prosecution did not do so.
- 11.** In her Court statement, the prosecutrix (PW1) has not disclosed her date of birth or her age. Apparent age of father of the prosecutrix, Baghel Bagh (PW2) is recorded on the deposition-sheet as 50 years. In paragraph 9 of his cross-examination, he had deposed that his marriage was performed 15 years back. He has total 8 daughters. His first daughter had taken birth after 1 year of his marriage and with a gap of about 2 years his remaining children took birth. Out of the said 8 children, what is the number of the prosecutrix has not been disclosed by the prosecution anywhere. If the marriage of father of the prosecutrix was performed 15 years back, age of his oldest daughter should be minimum 14 years. During the course of investigation, statements of 2 sisters of the prosecutrix, namely, Kaushalya and Saraswati

were recorded by the prosecution. In their statements, they have stated their age to be 20 years and 19 years, respectively. In these circumstances, statement of the father of the prosecutrix that his marriage was performed 15 years back and 1 year thereafter his first daughter took birth is not acceptable. Father of the prosecutrix has also not been able to state his date of birth. He has also not been able to state date of birth of the prosecutrix. His statement that his marriage was performed 15 years back also appears to be incorrect. In these circumstances, according to the statement of the father of the prosecutrix itself, it is not established that on the date of incident age of the prosecutrix was below 18 years. In the record of the Trial Court, one more document is available which was obtained under the Right to Information Act. In the said document, information of vaccination of mother and child is given. At serial number 13 of this document, entry of the prosecutrix is made, according to which date of birth of the prosecutrix is 21.10.1995. Thus, from the above also, it seems that on the relevant date, the prosecutrix was aged more than 18 years.

- 12.** With regard to the alleged incident, the prosecutrix (PW1) has deposed that on the date of incident at about 7:00 p.m., she along with her sister Rita had gone out to attend the call of nature. At that time, Appellant Panchanand came to her and asked whether she loved Appellant Bairagi or not. She refused and started to go back to her house. At that time, Appellants Panchanand and Bairagi caught her hands and tried to make her sit in an auto. They took her to Village Mudhapar where they kept her for 1 day. She has further deposed that when she was being taken away, her

sister Rita was shouting. She has further deposed that thereafter she was taken by Appellant Bairagi to Dhamtari by a train to the house of Appellant Sheela Banjare. At the house of Appellant Sheela Banjare, Appellant Bairagi committed sexual intercourse with her and on her refusal he committed *marpeet* with her. She has further deposed that thereafter Appellant Bairagi took her to the house of his sister situated at Village Magarlod. There also, he committed sexual intercourse with her. He kept her there for about 1 week. Thereafter, he took her to the house of sister of his elder *bhabhi* (elder sister-in-law) situated at Village Devpur. He kept her there for about 1 week and there also he committed sexual intercourse with her. Thereafter, he took her back to the house of Appellant Sheela Banajre at Dhamtari and kept her there for about 1 month. During her this stay at the house of Appellant Sheela Banjare at Dhamtari, she met with a woman and on being told by that woman she went to the police station. Thereafter, her uncle came to her and took her along with him. Thereafter, her statement was recorded by the police. In her cross-examination, she has admitted that other women and children were also present at the house situated at Village Mudhapar where she was kept. There, Appellant Bairagi and she were sleeping separately. She has further admitted that when Appellant Bairagi had been remaining in bathroom for taking bath for about ½ hour, at that time, she remained alone, but, she did not raise any voice nor did she make any complaint to anyone. She has further admitted that Appellant Bairagi took her to the bus-stand on a motorcycle. From there, they went to Raipur by a bus. From the Bus-Stand, Raipur, they went to the Railway Station, Raipur on their feet. She had stayed at the railway station alone for about 15 minutes and during

that period, Appellant Bairagi had gone away to bring breakfast. She has further admitted that at that time on the railway station, train ticket examiners, guards and public were also present. She has further admitted that prior to that, Appellant Bairagi had purchased a salwar suit and a sandal for her at Korba and she had also taken trial thereof in a trial room. She has further admitted that at the house of Appellant Sheela Banjare at Dhamtari, she lived like a *bahu* (daughter-in-law) and had also served breakfast and tea to the guests. She had also taken bath in the pond situated between the locality. She had taken care of the children of Appellant Sheela Banjare and she had also cooked food at her house. Appellant Bairagi had also been going out of the house of Appellant Sheela Banajare to meet his friends. In paragraph 11, she has further admitted that when she was sitting in the auto, at that time also, she had not raised any voice. In paragraph 6, she has further admitted that her caste and the caste of Appellant Bairagi are different and due to that her parents did not want her marriage with Appellant Bairagi.

13. Baghel Bagh (PW2), father of the prosecutrix has deposed that his other daughter Rita had told him that in the night of the incident, Appellant Bairagi telling the prosecutrix that Appellant Panchanand was calling her caught her and took her away. Thus, this witness was aware of the fact since beginning that Appellant Bairagi had taken the prosecutrix away forcefully with the help of Appellant Panchanand, but he has not disclosed this fact while recording of the report of missing of the prosecutrix.
14. Investigating Officer J.P. Thakur (PW7) has also admitted that initially in the report it was stated that the prosecutrix was forcibly

taken away on a motorcycle, but, later on, the fact of taking the prosecutrix away on the motorcycle was found to be false.

15. On a minute examination of the above evidence, it is clear that though the prosecutrix has deposed that Appellants Bairagi and Panchanand had forcibly taken her away and thereafter Appellant Bairagi had taken her to various places and this incident of taking her away was witnessed by her sister Rita, in this regard the prosecution has not examined Rita for the reasons best known to them. As per the Court statement of Baghel Bagh (PW2), father of the prosecutrix, he was aware since beginning that Appellants Bairagi and Panchanand had forcibly taken away the prosecutrix, but while recording of the missing report of the prosecutrix, this fact was not stated by him. From the admission made by Investigating Officer J.P. Thakur (PW7), it also reveals that initially it was reported that the prosecutrix had been taken away on a motorcycle, but, later on, it was found to be false. From the statement of the prosecutrix, it is also established that the parents of the prosecutrix did not want that marriage of the prosecutrix be performed with Appellant Bairagi. It seems that when the prosecutrix went away along with Appellant Bairagi, a false and fabricated story was concocted. Therefore, the entire prosecution case appears to be doubtful. Apart from this, from the admission made by the prosecutrix, it is also clear that for about 3 months, the prosecutrix visited and stayed at various places along with Appellant Bairagi. She also resided along with Appellant Bairagi at the house of Appellant Sheela Banjare. Thus, it is clear that she had ample opportunity to come out of the clutches of Appellant Bairagi and raise her voice and make complaint, but she did not do

so. Rather, she lived along with Appellant Bairagi at the house of Appellant Sheela Banjare as her *bahu* (daughter-in-law) and she was also taking care of the children of Appellant Sheela Banjare at her house and was also cooking food there. In these circumstances, it is well established that the prosecutrix was a consenting party to the alleged act. Thus, the finding of the Trial Court in this regard is not in accordance with the evidence available on record.

16. In the result, the appeals are allowed. The impugned judgment of conviction and sentence is set aside. The Appellants are acquitted of the charges framed against them.
17. 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