

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 27/06/2019****Judgment Delivered on : 04/07/2019****Criminal Appeal No. 433 of 2015**

Ajay @ Chaklu @ Guddu Prasad Pale S/o Budhnath Pale Aged About 33 Years R/o Village Madanpur Injko, Police Station Patthalgaon, Civil And Revenue District Jashpur, Chhattisgarh, Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh S/o Through The Police Station Kansabel, Civil And Revenue District Jashpur, Chhattisgarh, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Shakti Raj Sinha, Advocate.
For Respondent/ State	:	Shri Arun Shukla, G.A.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 4.3.2015 passed by Learned Additional Sessions Judge (FTC), Jashpur, District Jashpur, Chhattisgarh in Sessions Trial No. 78 of 2014, whereby and whereunder the learned Additional Sessions Judge has convicted the appellant for the offence under Sections 363, 366 and 376(1) of the IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo rigorous imprisonment for 3 years, 5 years, 7 years and 7 years and to pay fine of ₹1,000/- on each count, in default of payment of fine, to further undergo additional rigorous imprisonment for 1 month respectively with a direction to run all the sentences 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) The case of the prosecution, in brief, is that the prosecutrix (PW-7) is a minor girl. On 10.07.2014, when the prosecutrix (PW-7) was on her way to school at about 8:00 am, the appellant met her on the way and by force made her sit on his motorcycle and took her to a hotel in Patthalgaon, where in a rented room the appellant committed forceful sexual intercourse with her. Thereafter, the appellant took her to his relative's house in village Chintapani and stayed for a night and then took her to a place of another relative in village Ila where he and the prosecutrix (PW-7) stayed for a night. The prosecutrix (PW-7) was then released from his custody and she came back to her house and informed about the incident to her parents. A written complaint vide Ex. P/8 was given in police station Kansabel. On the basis of which, FIR Ex. P/7 was lodged. 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.

(4) During trial, the Court below framed the charge under Sections 366, 341 and 376(2) of the IPC alongwith Section 4 of the Protection of Children from Sexual Offences Act, 2012. The prosecution examined 22 witnesses to prove the guilt of the appellant. No witness was examined

in defence. Statement of the appellant was recorded under Section 313 of the Cr.P.C. wherein the appellant denied the circumstances appearing against him, pleaded innocence and false implication in the crime in question.

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

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

(7) Learned counsel appearing on behalf of the appellant submits that the conduct of the prosecutrix (PW-7) reveals that she was a consenting party, as she did not object to go alongwith the appellant and stayed in various places with him. The prosecution has failed to prove its case beyond reasonable doubt, that the age of the prosecutrix (PW-7) was below 18 years on the date of incident. It is further submitted that the radiologist Dr. Savita Singh (PW-22) has admitted in cross-examination that the radiological assessment of age has a margin of 2 to 3 years on either side. Hence, on this basis, there was no ground to hold that the prosecutrix (PW-7) was of aged below 18 years.

Reliance has been placed on the judgment of the Madhya Pradesh High Court in the case of **Narendrasingh Bahalsingh vs. State of Madhya Pradesh** reported in **1996 J LJ 256**, in which it has been held that the margin of error can be 3 years with respect to the age

determined in ossification test. Similar view has been taken by the Orissa High Court in the case of **Bishnudas Behera vs. State of Orissa** reported in **1997 CriLJ 2207** that the variation of age in the ossification test can be two to three years more or less on either side. Further reliance has been placed on the judgment of this High Court in the case of **Mukesh Kumar vs. State of Chhattisgarh** reported in **2007(3) MPHT18 (CG)** that the parents had made a statement regarding age of the prosecutrix (PW-7) and on speculation, the entry in the school registers were not of evidentiary value therefore, relying on the theory laid down in the case of **Modi's Jurisprudence** 20th edition, it was held that the range of error in the age determined by ossification test may be up to three years on either side. In the alternative, it is prayed that the appellant is suffering from paralysis and is in continued hospitalization. He is suffering from diabetes and high blood pressure which may also be taken into consideration. The appellant is in jail since the date of his arrest. Therefore, it is prayed that on these grounds, the appeal may be allowed and the appellant may be acquitted of the charges framed against him.

(8) Per contra, learned counsel for the Respondent/ State opposed the prayer and submissions. It is submitted that the statement of the prosecutrix (PW-7) does not disclose that she was a consenting party and that the medical theory gives a margin of only two years to the report of ossification test. Hence, no ground is made out for interference in the impugned judgment.

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

(10) On the basis of the submissions made on both the sides, it is found that there is no dispute that the appellant had taken the prosecutrix (PW-7) with him to the places and had physical relation with her.

(11) From the statement of the prosecutrix (PW-7), it appears that she did not object in going with the appellant and staying with him in other places which shows consent by her conduct. Therefore, the only issue remaining to be determined is the correctness of the finding regarding the age of the prosecutrix (PW-7) in the impugned judgment. The prosecutrix (PW-7) has not given any statement regarding her date of birth and said that on the date of incident her age was about 15 years.

(12) Hariram (PW-9) is father of the prosecutrix (PW-7), who has stated that the date of birth of his daughter was 19.6.1999. In cross-examination, he has admitted that at the time of giving statement to the police he had not stated about the date of birth of the prosecutrix (PW-7) and he again admitted that he does not remember the date of birth of the prosecutrix (PW-7).

(13) Rajendra Sidar (PW-8) is brother of the prosecutrix (PW-7) who has not made any statement regarding the age of his sister. He has further admitted in cross-examination that he does not know about the date of birth of his sister/ the prosecutrix (PW-7).

(14) No other witness has been examined with regard to the prosecution having knowledge about the date of birth of the prosecutrix (PW-7).

(15) Gopisai (PW-6), Headmaster has stated that in the school entry register date of birth of the prosecutrix (PW-7) was entered as 19.7.1999. In cross-examination, he has admitted that the entry of the date of birth of the prosecutrix (PW-7) has been made on the basis of the transfer certificate. Therefore, it appears that he is not the original author of the entry of date of birth in the school register and he has not made any statement regarding the source of information of date of birth of the prosecutrix (PW-7), therefore, his evidence is not convincing to that extent.

(16) Dr. Rosa Toppo (PW-17) had examined the prosecutrix (PW-7) and her assessment was that the prosecutrix (PW-7) was about 15 years of age. In her report, vide Ex.P/21 she had advised for ossification test for determination of the actual age of the prosecutrix (PW-7).

(17) Dr. Savita Singh (PW-22) is the radiologist who after x-ray examination of the prosecutrix (PW-7) had opined that the radiological age of the prosecutrix (PW-7) was 15 years. In cross-examination, she has admitted that the margin of error from 2 to 3 years is permissible in the radiological age determined.

(18) On closely scrutinizing the evidence present regarding the witnesses having knowledge of date of birth and age of the prosecutrix (PW-7), it is found that they have not made any statement with precision and exactness in a convincing manner that the date of birth of the prosecutrix (PW-7) was 19.7.1999 and particularly, Hariram (PW-9) has admitted in cross-examination that he does not have personal knowledge of date of birth of the prosecutrix (PW-7) and that he has made a mention of date of birth of the prosecutrix (PW-7) for the first time before the Court which he omitted to record in the statement under Section 161 of the Cr.P.C.

(19) Another witness on the point of age, Gopisai (PW-6) had not been the author of the original entry and had been unable to inform about the original source and information regarding the date of birth entry. Hence, under these circumstances, as it is the present view which has been expressed and reported by the High Court of Madhya Pradesh in the case of **Narendrasingh Bahalsingh vs. State of Madhya Pradesh** (supra), by the High Court of Orissa in the case of **Bishnudas Behera vs. High Court of Orissa** and by this Court in the case of **Mukesh Kumar vs. State of Chhattisgarh** (supra). It can be safely held that there is a margin of three years which can be added or subtracted from the age determined in the ossification test. As the principle is that when two views are available, the view in favour of the accused person shall be followed therefore, the addition of margin of error has to be given effect to in such cases. On that basis, it would be made out that the prosecutrix (PW-7) may have been about 18 years of age on the date of

incident. Therefore, the finding of the Court below on this point in the impugned judgment is not based on convincing evidence and not proved beyond reasonable doubt, which needs to be interfered with.

(20) On the basis of the discussions made herein-above, it is clear that neither it is a case of abduction under Section 363 of the IPC nor there is evidence to bring this case as defined under Section 366 of the IPC for the reason that the prosecutrix (PW-7) willingly accompanied and submitted for physical relation with the appellant. On the basis of the finding regarding the age of the prosecutrix (PW-7) that her minority is not proved, her submission to the appellant cannot be said to be unlawful. Therefore, it is also not a case of rape and the appellant is entitled to be acquitted for the charges against him. Hence, on the basis of the findings herein-above, this appeal is allowed and the conviction and sentence imposed upon the appellant by the impugned judgment is hereby set aside and the appellant is acquitted of the charges framed against him. The appellant is in jail and he be set at liberty forthwith after being satisfied by him the requirement of Section 437A of the Cr.P.C.

(21) Accordingly, the appeal is allowed.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE