

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 14/03/2019****Judgment Delivered on : 28/03/2019****Criminal Appeal No. 1038 of 2015**

Hemlal Chelak S/o Mohit Ram Chelak Aged About 18 Years Caste Satnami, R/o Village Bhothidih, Civil And Rev. Distt. Baloda Bazar/ Bhatapara Chhattisgarh. , Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh Through The Station House Officer, Police Station Bilaigarh, Civil and Revenue District Baloda Bazar/ Bhatapara Chhattisgarh.

---- Respondent

For Appellant	:	Shri Shailesh Ahuja, Advocate.
For Respondent/ State	:	Shri I. Lakra, P.L.

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

Heard.

(1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 12.8.2015 passed by Learned Second Additional Sessions Judge, Baloda Bazar, District Baloda Bazar, Bhatapara, Chhattisgarh in Sessions Trial No. 71 of 2014, whereby and whereunder the Learned Second Additional Sessions Judge has convicted the appellant for the offence under Sections 376 and 366 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 7 years and 5 years and to pay fine of Rs.5,000/- and Rs.2,000/- in default of payment of fine, to further undergo additional rigorous imprisonment for 1 year and 6 months, respectively with a direction to run both 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 prosecution case, in brief, is that FIR vide Ex.P/4 was lodged by Kushal Prasad Sahu (PW-3) stating that his daughter/ the minor prosecutrix (PW-2) went missing from the night of 1.8.2014 and that she was abducted by some unknown person. During investigation, the minor prosecutrix (PW-2) was recovered from the custody of the appellant vide Ex. P/5. On the basis of the statement given by the minor prosecutrix (PW-2), Section 376 of the IPC was further added and the investigation was taken up. 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 363, 366 and 376 of the IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The prosecution examined 10 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 and 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 prosecution has totally failed to prove that the age of the minor prosecutrix (PW-2) was below 18 years on the date of incident and otherwise, the minor prosecutrix (PW-2) had been a consenting party. The minor prosecutrix (PW-2) has made admissions in her cross-examination which shows that she was a consenting party. Kushal Prasad Sahu (PW-3) is father of the minor prosecutrix (PW-2), who is unable to recollect the date of birth of his daughter and similar is the statement of the mother of the prosecutrix, Chandrika Bai (PW-4). The examining doctor, Dr. Anita Verma (PW-9) has also opined after examining the minor prosecutrix (PW-2) that she appeared to be 16 years of age which may be either two years less or two years more. No witness has been examined to prove the date of birth of the minor prosecutrix (PW-2). 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. In alternative, it is prayed that if this Court is not inclined to allow the appeal and acquit the appellant, looking to the long detention of the appellant in jail, his sentence of imprisonment be reduced to the period of custody already undergone by him.

(8) Per contra, learned counsel for the respondent/ State opposed the prayer and submissions. He further submitted that the prosecution has proved its case beyond reasonable doubt and there is no reason to interfere with the impugned judgment. The minor prosecutrix (PW-2) has made a clear statement that she was raped, which is supported with the medical evidence of Dr. Anita Verma (PW-9). Hence, no case is made out for acquittal or for reduction in sentence of the appellant.

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

(10) The minor prosecutrix (PW-2) has stated that on the date of incident when she came out of her house during night for urinating, the appellant was present nearby who caught hold of her hands and by force took her to his own house in village Bhothidih and then forcibly raped her. Later on, she was recovered by the police. In cross-examination, the minor prosecutrix (PW-2) was confronted with the previous statement vide Ex. D/2. On comparing with the previous statement, it has appeared that she has made some improvement in the statement before the Court like that she was caught hold of by the appellant and taken to a village whereas, in previous statement she has stated that she was forcibly taken by the appellant to the place near *nala*, where he had sexual intercourse with her, this she has omitted to state before the Court. She admitted that she did not raise any alarm when she was taken by the appellant to his village. She has denied all the other adverse suggestions given to her.

(11) Kushal Prasad Sahu (PW-3) has stated that the age of his daughter was 16 years on the date of incident and he was the person who lodged a missing report and FIR vide Ex. P/4 against unknown persons. When the minor prosecutrix (PW-2) was recovered, she stated about the incident to her mother, Chandrika Bai (PW-4) and not to this witness. Chandrika Bai (PW-4), who is the mother of the prosecutrix, has stated about missing of the minor prosecutrix (PW-2), in her presence recovery from the appellant and the statement given by the minor prosecutrix (PW-2) before her that she was raped by the appellant. In cross-examination, her statement has remained unrebutted.

(12) Laxmin Sahu (PW-1) has stated about missing of the minor prosecutrix (PW-2). She has not stated anything further therefore, she was declared hostile.

(13) Gopal Prasad Sahu (PW-5) is the witness of the recovery of the minor prosecutrix (PW-2) which is not specifically challenged.

(14) Bhupendra Nath Sahu (PW-6), Patwari, is the maker of the spot map vide Ex. P/2. The evidence of Dr. Anita Verma (PW-9) is improved. She examined the minor prosecutrix (PW-2) and on examination of her body she has opined vide Ex. P/13A that there were symptoms of sexual intercourse with the minor prosecutrix (PW-2) about 3-4 days prior to the date of examination and the injury on her private part also 3 to 4 days old. She has also opined that the age of the minor prosecutrix (PW-2) is

of 16 years with margin of error of two years. In cross-examination, her statement regarding finding has remained unrebutted, however, her admission that she is neither a Radiologist nor a Gynecologist is not material and has no consequence. For the reason that she is a qualified doctor and even, though she is not a post-graduate, she has the authority report, which she has reported.

(15) Bhagwan Das Satnami (DW-1) and Mohan Lal Chelak (DW-2) have stated that they saw the appellant when he was being taken by the police and they have not made any statement to contradict the evidence of the prosecution regarding the incident that has taken place.

(16) The Court below in the impugned judgment has given this finding that the prosecution has failed to prove that the minor prosecutrix (PW-2) was below 18 years on the date of incident and the State has not filed any appeal in this respect, therefore, now the finding in this appeal as to whether her submission to the appellant at the time of incident was based on consent or not will be examined only on the basis of the statement of the prosecutrix (PW-2).

(17) After scrutiny of the evidence of the minor prosecutrix (PW-2) herself, though she stated that she was not a consenting party but her conduct appears to be that of a consenting party, therefore, her evidence is not worthy of reliance which cannot be made the basis for conviction of the appellant.

(18) 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 charge 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.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE