

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CR.A. No. 1180 of 2014

Palan Kaushik, S/o. Kumar Kaushik, Aged About 19 Years, R/o. Jinda, P.S. Pipariya, Present Address - Bypass Road Kawardha, P.S. Kawardha, Civil and revenue Dist. Kabirdham, Chhattisgarh.

---- Appellant

Versus

State Of Chhattisgarh, Through : Station House Officer, P.S.- Kawardha, District - Kabirdham, Chhattisgarh.

-----Respondent

For Appellant : Ms. Upasna Mehta, Advocate

For Respondent/State : Mr. A.N. Bhakta, Dy.A.G. with
Mr. Lav Sharma, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order On Board

10/01/2019

1. This appeal has been preferred against the judgment of conviction and order of sentence, passed by the learned Additional Sessions Judge (F.T.C.) and Special Sessions Judge (Protection of Children from Sexual Offences Act, 2012), Kabirdham (Kawardha) (C.G.), in Sessions Trial No.77/2014 on 17.11.2014, convicting the appellant for the offence under Section 363, 366 (a), 376 (2) (I) of the Indian Penal Code and Section 4 of POCSO Act and sentencing him to under go R.I. 7 years and fine of Rs.500/-, R.I. for 7 years and fine of Rs.500/-, R.I. for 10 years and fine of Rs.1000/- and R.I. for 10 years and fine of Rs.1000/- respectively with default stipulations.

2. Facts of the case in brief is this that on 24.03.2014, at about 4.00 PM, the appellant allured the minor prosecutrix with false promise to marry her and then abducted the minor prosecutrix from her lawful guardianship and took her to some place in village- Jinda, where he committed the offence of rape with her. In the morning of the next day, the prosecutrix informed her father on mobile phone, then she was recovered from the possession of the appellant and then the FIR (Ex.P-3) was lodged by her in police station on 25.03.2014. Prosecutrix was medically examined and the appellant was apprehended and he was also medically examined. The statement of the witnesses were recorded and after completion of investigative procedure, charge-sheet was filed before the concerned Court.
3. Appellant was charged with offence under Section 363, 366(a), 376 (2) (i) of the Indian Penal Code and Section 4 Protection of Children from Sexual Offences Act. The appellant denied the charges and prayed for trial. The prosecution examined as many as 12 witnesses on its behalf. On examining the appellant under Section 313, he denied all the incriminating evidence against him and pleaded innocence and false implication. One witness was examined in defence. On completion of trial, judgment has been delivered, in which the appellant stands convicted and sentenced as mentioned aforesaid.

4. It is submitted by the learned counsel appearing on behalf of the appellant that the trial Court has passed totally erroneous judgment of conviction without there being any basis of reliable and cogent evidence in support of the charge. The evidence of the prosecutrix (P.W.-2) shows that the prosecutrix had willingly accompanied the appellant and had physical relation with him. Further the age of the prosecutrix was below 18 years has not been specifically proved by the prosecution. Vague statements have been made regarding date of birth of the prosecutrix, which is not supported with any certificate or other reliable evidence. Radiologist Dr. G.K. Suryavanshi (P.W.-7) has though opined that the age of the prosecutrix would have been between 15.5 to 16 years, but he has admitted that on taking the margin of two years, the prosecutrix may be 18 years of age. Hence, on this basis, the prosecutrix was capable for giving consent in this case. Hence, the conviction of the appellant is bad in law. Therefore, it is prayed that the appellant be acquitted of the charge. It is prayed in the alternative that in case, this Court is not inclined to allow this appeal and acquit the appellant in that case, at least sentence imposed upon the appellant, which appears to be too harsh may be reduced.
5. Counsel for the State opposes the grounds raised in appeal and the submissions made in this respect. It is submitted that the prosecution has proved its case beyond all reasonable doubts. It is further submitted that the prosecutrix (P.W.-2) has made clear

and categorical statement that she was raped without her willingness and consent. Further the prosecution has successfully proved, the age of the prosecutrix was below 18 years. Any vague statement made by any of the witnesses does not give rise to presumption that the prosecutrix should have been of age about 18 years. Hence there is no room for interference in the impugned judgment, hence, the appeal be dismissed.

6. I have heard the learned counsel for the parties and perused the record of the Court below.
7. 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?
8. The prosecutrix (P.W.-2) is shown to be 14 years of age in the deposition. She has stated that on the date of incident, when she came out of the school after examination, the appellant was present with motor cycle. The appellant said that he wants to marry her and by force made her ride the motor cycle. The appellant took the prosecutrix to village Jinda and then by taking her to a field, he by force had sexual relation with her thrice. She has stated that later on, she got the mobile of the appellant and made a call to her father, it was when her father came with police personnel and she was recovered. She has also stated about lodging of FIR Ex.P-3 and about her presence in other police investigation procedure. In cross-examination, her statement that

she was forcibly abducted and then forcibly subjected to offence of rape has remained un rebutted. Although, she has admitted that she did not raise any alarm on any occasion. She has denied all the other suggestions given in defence. She has made clear statement in her examination-in-chief that her date of birth is 22.11.1999 and no question has been put to her in cross-examination to challenge the statement made by her.

9. Baldau Kaushik (P.W.-1) is father of the prosecutrix. He has stated that on 24.03.2014, his daughter, the prosecutrix (P.W.-2) went missing. He went for her search and also gave missing information. On the morning of the next day, he received phone call from his daughter then after coming to know about the whereabouts of the appellant and the prosecutrix, this witness with the help of police personnel arrived on the spot and recovered his daughter from the custody of the appellant. The prosecutrix informed him that the appellant had caught hold of her hand and took her on his motor cycle and then also raped her without her willingness. This witness was confronted with his previous statement and there appears to be some improvement, which does not appear to be material in any sense. In paragraph No.14 in his cross-examination, he has admitted that his marriage has taken place 20-25 years before and his first daughter was born after one year of the marriage and the second son was born after one year and thereafter, the prosecutrix was born after one year. Questions put and the answer received are vague in nature

and do not help in making any calculation. No reference has been made to specific date about any child of this witness. Hence nothing can be made out regarding the age of the prosecutrix on the basis of such statement.

10. Rajani Kaushik (P.W.-3) is the mother of the prosecutrix has clearly stated that the age of the prosecutrix was 14 years and four months on the date of recording her deposition. She has stated about the prosecutrix went missing and about receiving the information from phone call. But she has not made any statement regarding any query made from her daughter. In cross-examination of para-7, she states that her marriage was taken place about 15-20 years and she has also made statement about birth of the children on similar intervals as Baldau Kaushik (P.W.-1) has stated, which is not sufficient to make out that what could have been the age of the prosecutrix and no specific question has been put to her in her cross-examination to rebut the age of her daughter had not been 14 years and four months on the date, the deposition was being recorded. Baldau Kaushik (P.W.-1) and Rajni Kaushik (P.W.-2), both are the parents of the prosecutrix and it can be said that they are the authority to have knowledge about the date of birth of the prosecutrix, who is their child.
11. Dr. Heena Ahmad (P.W.-12) has stated that she examined the prosecutrix on 25.03.2014 and on the basis of the finding, she has reported vide Ex.P-15-A that there had been a sexual

intercourse with the prosecutrix before she was examined. She had advised for radiologist examination for confirmation of age. Dr. G.K. Suryavanshi (P.W.-7) is radiologist, who has on the basis of X-ray findings reported vide Ex.P-10 that the age of the prosecutrix would have been 15.5 years. In cross-examination, he has again reiterated that the age of the prosecutrix according to his opinion would have been 15.5 and 16 years but then he also made admission that, if the, margin of two years is added then the age of the prosecutrix may have been 18 years. The opinion given by the radiologist is not a exact opinion. Reliance can be placed on such opinion only, if there is no proof regarding exact age of the persons concerned.

12. The counsel for the appellant also relies upon the judgment of this Court in case of ***Dethari Vs. State of M.P. (Now C.G.)***, reported in ***2007 (2) C.G.L.J. 496*** in which it was held in paragraph-7 that in Modi's Medical jurisprudence (20th Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be upto three years on either side. The counsel has also relied on the judgment passed by this Court in case of ***Gudda @ Nabiullah Vs. State of M.P.***, reported in ***2015 (4)***

C.G.L.J. 296, in which the Court had opined on the basis of the evidence present in this case the prosecution has failed to prove that the age of the prosecutrix was below 18 years.

13. The radiologist opinion and the opinion given by other physician have force of only opinion, they are not the facts and the facts have to be determined on the basis of the evidence present, in which any conclusion drawn in any other case, can not be uniformly accepted for the purpose of making decision in any another case. Hence, making this observation I proceeded to conclude in this case. In my opinion, the parents of the prosecutrix are the authority to know and speak about the exact age of the prosecutrix. The admission made by Dr. G.K. Suryavanshi (P.W.-7) is not an admission with certainty. The statement regarding the margin is not a final verdict, hence, it is not necessary that the margin should be added in each and every cases. The age of the prosecutrix on the date of incident was 14 years and the gap of four years can not be overlooked and held that the age of the prosecutrix may have been above 18 years. Hence, under these circumstances, I am of this opinion that the prosecution has successfully proved that the age of the prosecutrix was below 18 years. Apart from that according to the statement given by the prosecutrix herself, she was not a consenting party. Therefore, after close scrutiny and on due consideration on all the material present in this case on record, I am of the view that the Court below has not committed any error

in convicting the appellant for the offences as aforesaid. Therefore, there is no need to interfere with conviction of the appellant in the impugned judgment.

14. Considered on the prayer made for reduction of sentence. The appellant himself was young man about 18-19 years on the date of incident and according to the evidence present in this case, there are some suggestions, which have not been accepted as proved but even though they exist, hence, after due consideration I feel inclined to allow this prayer. The conviction recorded by the trial Court in the impugned judgment in all the offences charged are upheld. The sentence imposed upon the appellant for offence under Section 376 of the Indian Penal Code and for Section 4 of Protection of the Children from Sexual Offences Act, 2012 are interfered with and set-aside and instead of that, the appellant is now sentenced with R.I. for 7 years along with fine of Rs.1,000/- and R.I. for 7 years along with fine of Rs.1,000/- respectively. Whereas the sentence of imprisonment and fine with respect to the remaining offences for which the appellant has been convicted are maintained as it is.

15. Accordingly, the appeal is disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge