

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 485 of 2001

- Rajesh Kumar S/o Kishun Prasad, aged about 18 years, Occupation- Student, R/o Village Raghunathnagar, P.S. Ramkola, District Surguja, Ambikapur (C.G.)

---- Appellant

Versus

- The State of Chhattisgarh Through : P.S. A.J.K. Ambikapur, Surguja (C.G.)

---- Respondent/State

For Appellant	:	Shri Shrikant Kaushik, Advocate appears on behalf of Shri A.K. Prasad, Advocate
For Respondent/State	:	Shri Ashish Gupta, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

23.01.2020

1. This appeal arises out of the judgment of conviction and order of sentence dated 19.05.2001 passed by the Special Judge (Prevention of Atrocities Act), Surguja, Ambikapur (C.G.) in Special Criminal Case No. 04 of 2000, whereby the Appellant stands convicted and sentence as under:-

<u>Conviction</u>	<u>Sentence</u>
Under Section 376 of Indian Penal Code (in short 'IPC')	R.I. for seven years and pay a fine of Rs.1,000/-, in default of payment to further undergo R.I. for six months
Under Section 366 of IPC	R.I. for three years and pay a fine of Rs.1,000/-, in default of payment to further undergo R.I. for six months
Both sentences to run concurrently	

2. The case of the prosecution in brief is that when the prosecutrix (PW-7) was at her home on 07.11.1999, the appellant, who is neighbour of the prosecutrix, came to her home saying that I cannot live without you (prosecutrix) and he proposed her for marriage, thereafter, he abducted the prosecutrix from the lawful guardianship of her father. Thereafter, the appellant took the prosecutrix to the house of Subhash (PW-1) where both stayed for two days and during this period, the appellant committed sexual

intercourse against the will of the prosecutrix. When father of the prosecutrix came to know that the prosecutrix was in the house of Subhash, her father alongwith Sarda Prasad Guruji (PW-2) went there and took the prosecutrix to his home, then the prosecutrix told her father about the incident. At the time of incident, the prosecutrix was a minor below 16 years of age. F.I.R. (Ex.-P/16) was lodged by the prosecutrix (PW-7) on 09.11.1999 at about 11:20 am in the police station Outpost Raghunathnagar. The prosecutrix was sent for medical examination. PW-10 Dr.(Smt.) Shashiprabha examined the prosecutrix and gave her report Ex.-P/23 in which she opined that there was no external injury present over the body of the prosecutrix but she opined that intercourse must had been performed within two days. She (Dr.) also prepared two slides from vaginal swab and advised for chemical examination of the same.

3. During investigation undergarments of the prosecutrix were seized vide seizure memo Ex.-P/2. Spot map was prepared vide Ex.-P/3. One certificate (Ex.-P/5) regarding age of the prosecutrix was obtained from Head Master of Middle School, Raghunathnagar and photocopy of Admission & Discharge Register (Ex.-P/9C) were seized through Ex.-P/6, according to which, her date of birth is 23.08.1986. One undergarment of the accused/appellant was also seized vide Ex.-P/13.
4. After investigation, charge-sheet was filed against the appellant/accused for the offence under Sections 363, 366, 376 & 342 of IPC and since the prosecutrix belongs to scheduled caste, Section 3(1)(xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short 'Special Act'). While framing the charge, the Special Judge framed the charge against the accused/appellant under Sections 366 & 376 of IPC and Section 3(2)(v) of the Special Act. The appellant has denied the charge framed against him and prayed for trial.
5. The prosecution in order to establish charge against the accused/appellant

examined 10 witnesses namely PW-1 Subhash Panika, PW-2 Sarda Prasad, PW-3 Vishwabhusan Nath, PW-4 Birjhu Singh Aayam, PW-5 Bhawat Prasad Rajbhanu, PW-6 Dr. Marut Kumar Manhar, PW-7 Prosecutrix, PW-8 Ramvihar, PW-9 M.S. Chandel and PW-10 Dr.(Smt.) Shashiprabha Jaiswal. Statement of the accused/appellant was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him and stated that he is innocent, he has been implicated in a false case and he examined Motiram as DW-1 in his defence.

6. After appreciation of the evidence available on record, the learned the Special Judge (Prevention of Atrocities Act), Surguja, Ambikapur by the impugned judgment, while acquitting the accused/appellant of the charge under Section 3(2)(v) of the Special Act, convicted and sentenced him as mentioned in para- 1 of this judgment, hence this appeal.
7. Learned counsel for the appellant submits that prosecution has failed to prove that the prosecutrix was below 16 years of age on the date of incident whereas she was above the age of 16 years. He further submits that the prosecutrix herself left her home as she was assaulted and scolded by her father. He also submits that the prosecutrix admitted in her deposition in para-26 that the appellant never committed any wrong act with her. In paras 13, 14, 15 & 16, the prosecutrix also admitted that she never offered any resistance or cried for help, she came out from her house and went with the appellant on her own will. He also submits that the prosecutrix admitted in her deposition in para-27 that the appellant had written 2-3 letters to her, but in para-12, she admitted that prior to the incident, both the appellant and the prosecutrix had written letters to each other and one letter was kept by her father, therefore, looking the entire evidence of the prosecutrix (PW-7), it is clear that she left her home on her own will. He submits that no evidence has been adduced by the prosecution regarding date of birth of the prosecutrix or specific date. He submits that the prosecutrix was a

consenting party to the act of the accused/appellant as she had physical relations with the accused/appellant for about two days where they stayed and did not disclose the same to anyone. Hence, the offence under Sections 376 and 366 of IPC is not made out against the appellant and he is entitled for acquittal.

8. On the other hand, learned Panel Lawyer for the State has contended that the prosecutrix was minor and below 16 years of age as held by the Special Court, there is no illegality or infirmity in the findings arrived at by the Special Court. The prosecutrix was taken away from the lawful guardianship for compelling her to marriage by the appellant, therefore, the impugned judgment of the Special Court needs no interference by this Court.
9. Having heard rival contentions of the parties, I have perused the record of Special Criminal Case No. 04/2000.
10. First this Court considers the age of the prosecutrix (PW-7). No any specific evidence regarding particular date of birth of the prosecutrix was mentioned by prosecutrix's father or the prosecutrix herself. PW-3 Vishwabhusan Nath is the father of the prosecutrix. PW-3 has not stated in his deposition regarding actual date of birth of the prosecutrix, nor any other witnesses have stated about the date of birth of the prosecutrix. The mother of the prosecutrix has not been examined by the prosecution. Therefore, parents of the prosecutrix are unable to prove the particular date of birth of the prosecutrix.
11. PW-4 Birjhu Singh Aayam is the witness of Ex.-P/9C, a photocopy of Admission & Discharge Register (Ex.-P/9C), in which the name of the prosecutrix and her father's name are recorded at Serial No. 397 and according to Ex.-P/9C, the date of birth of the prosecutrix is 23.08.1986, but PW-4 has stated in his deposition that the prosecutrix had taken admission in Class 6th in the School on the basis of transfer certificate and no source of information is proved by this witness (PW-4) regarding date of birth which

was mentioned in Ex.-P/9C.

12. In *Alamelu and another Vs. State represented by Inspector of Police, (2011) 2 SCC 385*, the Supreme Court held that the transfer certificate which is issued by a government school and is duly signed by the Headmaster would be admissible in evidence u/s 35 of the Evidence Act 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The Supreme Court held that – the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

13. Following the decision of the Supreme Court in *Alamelu* (supra), this Court in the case of *Subelal Vs. State of M.P. (Now C.G.), reported in 2011 (4) C.G.L.J. 424*, held that “*Premlal Mishra PW 10 Head Master produced admission register of Class VI according to which her date of birth is 12-6-1976 but entry was not made by him. Her mother PW 9 Purain Bai, Girdhar Ram Sahu PW 11 father of the prosecutrix did not depose the age of the prosecutrix. On the basis of ossification test doctor determined her age between 15 to 16. Thus the prosecution could not establish that the prosecutrix was minor. Prosecutrix accompanied the appellant from Zoratarai to Bhakara on his bicycle then she visited many places with the appellant but she did not make any complaint. Prosecutrix was a consenting party.*”

14. In the present case, no *kotwaripanni* or birth certificate was produced by the prosecution, nor any particular date of birth of the prosecutrix was stated by the father of the prosecutrix, nor any source of date of birth mentioned in the register (Ex.-P/9C). PW-4 Birjhu Singh Aayam produced the Admission & Discharge Register (Ex.-P/9C) of the school. In the admission register there is entry of the name of the prosecutrix at serial No. 397, according to which,

her date of birth is 23.08.1986 and the prosecutrix was admitted in the concerned Institution, in Class-6th. PW-4 admitted to have produced the original Admission & Discharge Register of the school and the photocopy of the same is Ex.-P/9C, however, this witness has not stated as to on what basis the entry regarding date of birth of the prosecutrix was mentioned in the said register. Though PW-4 admitted to have given the certificate (Ex.-P/8) regarding caste of the prosecutrix on the basis of entry in the Admission & Discharge Register (Ex.-P/9C) according to which her caste is '*Chamar*' which was also not proved.

15. PW-1 Subhash and PW-2 Sarda Prasad have not supported the prosecution case and they have been declared hostile.

16. PW-7 prosecutrix has stated in her court evidence that on the fateful day i.e. day of dewali festival, at about 10-11.00 pm she came out from her home for seeing the appellant because the appellant told the prosecutrix that if you (prosecutrix) will not come with him (appellant), he will commit suicide on door of her home and the appellant was there. Thereafter, both the appellant and the prosecutrix left the home of the prosecutrix and reached at the house of Subhash (PW-1) where they stayed for two days. She stated that during her stay with the appellant at Subhash's house, the appellant committed sexual intercourse with her. Thereafter, the appellant and the prosecutrix were planing to go to Ambikapur, but the money was not arranged. She stated that the accused suggested her to go to her home but she denied to return to her parents' home. PW-7 prosecutrix admitted in para-12 that prior to the incident, both she and the appellant had written letters to each other and 3-4 times she had also replied the letters written by the appellant.. In para-13 she admitted that on the day of incident at night she lightened the lamp of Diwali and she came out from her home, the appellant was on the door of her home and lifted her on his lap but she did not raise hue and cry and when she was being taken by the appellant by

holding her hand, she also did not raise cry. She also stated in para-14 that when they reached at the home of Subhash (PW-1), Subhash's wife and his children were there, but she did not disclose anything to them. In paras-15 & 16 she admitted that when the appellant made sexual intercourse with her in Subhash's home, she did not complain to Subhash's wife and both were living happily in the home of Subhash. On the next day, the appellant wanted to leave the prosecutrix to her home, but she did not want to go to her home because she had failed in her studies and her father used to beat and scold her. In para 17 she admitted that her father reached the home of Subhash for taking her and she did not disclose about the incident to her parents and any other person. In para-25 she admitted that when on the day she had gone out from her home alongwith the appellant to the house of Subhash, if she had raised alarm, then her parents and neighbour would have woken up, therefore, she did not raise alarm. In para-26, she admitted that only she had slept with the appellant together in a room and nothing wrong was done with her.

17. Further, Ex.-D/2, is an affidavit executed on 20.12.1999 by PW-3 Vishwabhusan Nath, father of the prosecutrix. In the said affidavit, PW-3 has stated in para-4 that the appellant had not taken or kidnapped or abducted the prosecutrix and he had not committed rape with the prosecutrix. PW-3 has admitted in his court deposition in para-19 that on 20.12.1999 he had come Ambikapur and he had executed affidavit for bail in favour of the appellant. He further admitted that he had executed the affidavit on pressure, but he did not explain in whose pressure or threatening, he executed the affidavit.

18. DW-1 Motiram has only stated that the allegation made against the appellant/accused was false.

19. Considering the facts and circumstances of the case, the date of birth mentioned in Ex.P/9C Admission & Discharge Register has no evidentiary

value and is of no help to the prosecution in view of the principles laid down in the above cited case. Even the prosecution did not attempt for ossification test of the prosecutrix, nor produced the birth certificate of the prosecutrix and no reason for this has been given. Further, the appellant took the prosecutrix to the house of Subhash (PW-1) where they stayed for two days, and the prosecutrix alleges that she was subjected to forcible sexual intercourse by the appellant in the house of Subhash (PW-1). Though the prosecutrix (PW-7) had left her house with the appellant and she had gone to Subhash's house where appellant had sexual intercourse with her but the prosecutrix did not make any complaint to anyone and stayed with him without any resistance. This shows that she was not abducted and was not taken by force and she accompanied the appellant on her own will and it was not a case that the appellant committed sexual intercourse without her consent. Considering the contradictory evidence of the prosecutrix, evidence of age and conduct of the prosecutrix, I am of the view that the prosecutrix was a consenting party with the appellant and in the above facts and circumstances of the case, the offence under Sections 376 and 366 of IPC would not be made out against the appellant.

20. For the foregoing reasons and discussions, the appeal is allowed. The conviction and sentence awarded to the appellant under Sections 376 & 366 of IPC are set aside. The Appellant is acquitted of the said charge framed against him. If fine amount has been deposited, the same be refunded to the appellant.

21. It is also stated that the accused/Appellant is on bail since 04.09.2001, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437-A of Cr.P.C.

Sd/-
(Gautam Chourdiya)
Judge