

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 199 of 1999

- Manoj Kumar S/o Tulsiram Kannoje, by caste Mehttar, aged 21 years, R/o Charouda, Thana Gharsivan, District Raipur, M.P. (now C.G.)

---- Appellant

Versus

- The State of M.P. (Now C.G.) through the District Magistrate, Raipur (C.G.)

---- Respondent/State

For Appellant	:	Smt. Indira Tripathi, Advocate
For Respondent/State	:	Shri Vimlesh Bajpai, Government Advocate

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

16.09.2020

- This appeal is heard through Video Conferencing.
- This appeal arises out of the judgment of conviction and order of sentence dated 07.01.1999 passed by the Third Additional Sessions Judge, Raipur in Sessions Trial No. 429 of 1997, whereby the appellant stands convicted and sentenced as under:-

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of Indian Penal Code (for short 'IPC')	R.I. for two years and pay a fine of Rs.2,000/-, in default of payment to further undergo additional R.I. for six months

- In this case, the prosecutrix (PW-6) and the appellant were resident of same village namely Charouda, P.S. Dharsiva, both of them are of the same caste and well known to each other.
- Facts of the case, in brief, are that on 27.08.1997, Ex.-P/17 *Dehatinalishi* was recorded at Village Charouda, P.S. Dharsiva by PW-16 Laxmi Prasad Dubey, Head Constable about missing person No.11/97, in the police station Dharsiva which was recorded in *Roznamcha Sanha* No. 985 dated 27.08.1997 vide Ex.-P/17C. During investigation, as per *Dehatinalishi*,

information was received by PW-16 Laxmi Prasad Dubey, Head Constable that the missing girl (prosecutrix) aged about 15 years had returned to her home, on which he reached village Charouda. After inquiry from the prosecutrix (PW-6), her father Santram, her mother Ramkunwar and Suphud Ram by PW-16, it was revealed that on 26.08.1997, appellant Manoj Kumar had kidnapped the prosecutrix on the enticement of marrying her and keeping her as wife from the lawful guardianship of her father and went to his maternal uncle at village Kodwa. On the way, the appellant committed forcible sexual intercourse with the prosecutrix while going to Kodwa village and kept her in the house of his maternal uncle. It was also revealed that on the date of incident i.e. 26.08.1997 at about 06:30 pm the prosecutrix went to answer the call of nature and did not return home and at that time her neighbour Manoj Kumar also went missing. After inquiry of *Roznamchasahna* No. 985 and Missing Report No. 11/97, F.I.R. (Ex.-P/11) was registered under Sections 363, 366 and 376 of IPC in Police Station Dharsiva by PW-13 U.K. Chandrawanshi, Sub-Inspector against appellant Manoj Kumar.

5. The prosecutrix (PW-6) was medically examined by PW-14 Dr. Suniti Mangrulkar 28.08.1997 and she gave her report Ex.P/16. As per report (Ex.-P/16), Doctor mentioned that no sign of external injury was found on the body of the prosecutrix, no sign of injury on external genitalia was found, hymen was ruptured and opined that sexual intercourse has taken place approximate one or two days before the examination.
6. During investigation *nazrinaksha* (Ex.-P/1) was prepared by Patwari Prakash Kumar (PW-1). Admission register was seized vide Ex.-P/8C in which the date of birth of the prosecutrix was mentioned as 11.12.1982. Spot map was prepared vide Ex.-P/10. Photograph of the prosecutrix was seized vide Ex.-D/2. One love letter written by the prosecutrix to the appellant was seized vide Ex.-D/3. Case diary statements of the prosecutrix (PW-6) and her father

Santram (PW-12) were recorded by the police and the accused was arrested on 28.08.1997.

7. After completion of investigation charge-sheet was filed by the police for the offence under Sections 363, 366 & 376 of IPC. While framing the charge, the Third Additional Sessions Judge, Raipur framed the charges against accused/appellant under Sections 363, 366 & 376 of IPC.
8. So as to hold the accused/appellant guilty, the prosecution examined 16 witnesses i.e. Prakash Kumar (PW-1), Gautam Ram (PW-2), Shyamnarayan Rathore (PW-3), Sewak Ram (PW-4), Khediya Bai (PW-5), prosecutrix (PW-6), Maujiram (PW-7), Khubchand Verma (PW-8), Ganguram (PW-9), Dr. S.B. Mangrulkar (PW-10), Sukluram Kannoje (PW-11), Santram (PW-12), U.K. Chandrawanshi (PW-13), Dr. Suniti Mangrulkar (PW-14), Punitram (PW-15) and Laxmi Prasad Dubey (PW-16) in support of its case. Statement of the accused/Appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In his defence, the appellant has stated that the prosecutrix used to write love letter to him and she wants to live with him and had told him that if he did not live with her, she would consume poison. He also stated as the prosecutrix and himself are of the same *Gotra*, the prosecutrix happens to be his sister in relation, therefore, her family members refused to marry her with him. The appellant examined two defence witness namely Meenaprasad Verma as DW-1 and Ledga as DW-2 in his support.
9. After appreciation of the evidence available on record, the learned Third Additional Sessions Judge, Raipur by the impugned judgment, while acquitting the appellant of the charges under Sections 366 & 376 of IPC, convicted and sentenced him as mentioned in para- 2 of this judgment, hence this appeal.
10. Learned counsel for the appellant vehemently argued that the age of the

prosecutrix (PW-6) is core issue in the matter. In the present case, the only document which may throw some light on the point of age is Ex.-P/8C i.e. admission register of the school of the prosecutrix in which her date of birth is mentioned as 11.12.1982. As per this document, age of the prosecutrix can be assessed as 14 years and 08 months and 15 days on the date of incident. She submitted that on which basis, the said entry was made in Ex.-P/8C regarding date of birth of prosecutrix, was not proved by the prosecution. No other document is collected or presented during trial. Though the prosecutrix is educated upto 5th standard but in her entire deposition, she has not said anything regarding the date, month or year of her birth. PW-12 Santram, father of the prosecutrix, has also not said anything specific regarding the age of the prosecutrix. Police also failed to collect the entries of village Kotwar which are registered in the birth and death register officially maintained by the Kotwar. She also submitted that only on the basis of admission register (Ex.-P/8C), it may not be held that the prosecutrix was minor at the time of incident, therefore, the prosecution has not proved its case that at the time of incident the prosecutrix was minor, i.e., below the age of 18 years.

11. Learned counsel submitted that no sign of injury or forcible sexual intercourse was found on the body of the prosecutrix and since the prosecutrix was a consenting party, the trial Court has acquitted the appellant of the charges under Sections 366 & 376 of IPC. She further submitted that when the appellant forcibly took the prosecutrix from village Charouda to Kodwa village of his maternal uncle, she did not raise any alarm on the way and she remained in the house of maternal uncle of the appellant in the night without raising any objection. She did not disclose about her abduction to the family members of the maternal uncle of the appellant. Hence, the offence under Section 363 of IPC is not made out and the appellant be acquitted of the charge and appeal may be allowed. In

support of above contention, reliance has been placed on the decision of this Court in the matter of ***Shivcharan alias Jarha Vs. State of M.P., 2012 (4) C.G.L.J. 140.***

12. On the other hand, learned counsel for the State supporting the impugned judgment submitted that the trial Court has rightly convicted and sentenced the appellant for the above offence which needs no interference by this Court.
13. Heard learned counsel for the parties and also perused the records of the trial Court.
14. First this Court considers the age of the prosecutrix (PW-6). As per evidence of PW-12 Santram (father of the prosecutrix), he stated in para-3 of his deposition that on the date of incident when her daughter had gone to answer the call of nature, she did not return home and then he went in search of the prosecutrix. Thereafter, he lodged the missing report of the prosecutrix in Police Station Dharsiva. PW-12 also stated that when he was in the police station at about 05:00 pm, the mother of the appellant came in police station and told that the maternal uncle of the appellant has brought the appellant and the prosecutrix to home, then PW-12 reached the home. PW-12 stated that when he asked the prosecutrix where she had gone, the prosecutrix stated that when she had gone to answer the call of nature, appellant Manoj caught hold of her hand and told that he would marry her and on the point of knife, he took the prosecutrix to village Kodwa and on the way at *raita-naala* he committed rape upon the prosecutrix, thereafter maternal uncle of the appellant has brought both the appellant and prosecutrix to village. PW-12 further admitted in paras 8 & 10 that he has no knowledge as to in which year his marriage was solemnized, he has three children and the prosecutrix is the eldest one. However, he does not know as to in which year his children were born. PW-12 also stated that he did inform the police of his age i.e. 25-26 years while recording his case diary

statement (Ex.-D/3) but it was recorded as 36 years in Ex.-D/3. Looking to the entire evidence of PW-12, he is unable to explain the actual date or year of his marriage, nor the date, month or year of birth of his children and also he deviated from his case diary statement (Ex.-D/3).

15. PW-9 Ganguram, Head Master of Girls Primary School, Charouda, has proved the admission register (Ex.-D/8C) in which the date of birth of the prosecutrix was mentioned as 11.12.1982, but the father of the prosecutrix (PW-12) has no knowledge of the date or year of birth of the prosecutrix. Looking to the evidence of PW-12, no specific date of birth of the prosecutrix, nor any source or other document regarding date of birth of the prosecutrix were proved by PW-12.

16. PW-6 prosecutrix has stated in her deposition that she is 16 years of age. She admitted in para-29 that she has no knowledge about her date of birth, but she told that she is 16 years of age on guesstimation. But she denied the entire case diary statement recorded under Section 161 Cr.P.C. vide Ex.-D/1 from 'A to A', 'B to B', 'C to C' & 'D to D' portion. In Ex.-D/1, she admitted that she was having a love affair with the appellant, but she denied the entire statement and a new story was stated in her court evidence regarding the appellant was forcibly taking her on the point of knife from village Charouda to the house of his maternal uncle at village Kodwa. Looking to the entire evidence of the prosecutrix (PW-6), it is clear that no specific date of birth was mentioned by the prosecutrix in her deposition

17. PW-14 Dr. Suniti Mangrulkar examined the prosecutrix (PW-6) and gave her report (Ex.-P/16). As per Ex.-P/16, Doctor mentioned that no sign of external injury was found on the body of the prosecutrix, no sign of injury on external genitalia was found, hymen was ruptured and opined that sexual intercourse has taken place approximate one or two days before the examination. Doctor (PW-14) admitted in para-4 of her deposition that she mentioned the age of the prosecutrix as 14 which was estimated age, but she has not

advised the police for sending the prosecutrix for radiologist examination.

18. PW-4 Sewakram is the grand-father (*naana*) of the appellant and is resident of village Kodwa. PW-4 stated that the appellant brought the prosecutrix and she appeared to be of marriageable age. PW-4 further stated that he asked the appellant why he brought that girl/prosecutrix and he (PW-4) scolded the appellant and the girl. PW-4 further stated in para-3 that the girl said that she was in love with the appellant and if he did not accept her, she would consume poison and she came with him of her own will. PW-4 further stated that the prosecutrix was about 19-20 years of age. PW-5 Khediya Bai is the wife of PW-4 and she has supported the version of PW-4.

19. DW-1 Meenaprasad Verma has stated that he heard in the village that the prosecutrix eloped with the appellant and on the next day they returned the village. DW-2 Ledga is resident of village Charouda and has stated that the father of the prosecutrix is his relative. DW-2 has stated that about 1½ – 2 years prior to recording of his statement, both appellant and prosecutrix were having affair with each other. DW-2 further stated that the prosecutrix was born in his village and according to him, the prosecutrix was 19-20 years of age.

20. In *Shivcharan* case (*supra*), this Court held as under:

“The prosecutrix visited several places with the appellant by bus and worked in the field with several persons, she was brought back by her consin Elthoris Tigga PW 2 but again went to the house accused and stayed there for two weeks. The silence maintained by her throughout indicates that she was consenting party. Tobias Tigga PW 5 the pastor of the Church stated that baptism certificate of the prosecutrix was issued by him in which her date of birth is mentioned as 1-8-1976 but he could not tell on what basis her date of birth was recorded. Radiologist has opined the age of the prosecutrix to be 14-16 years age with which some plus and minus margin has to be there. Prosecutrix and her brother have not

stated anything about her age and mother & father not examined. Doctor opined that she was habitual to sexual intercourse." Therefore, this Court found that conviction of the appellant awarded by the trial Court was not proper, set aside the judgment impugned and acquitted the appellant of the charges under Sections 363, 366 and 376 of IPC levelled against him.

21. Considering the facts and circumstances of the case, no *kotwaripanj*i or birth certificate was produced and proved by the prosecution, nor any particular date of birth of the prosecutrix was stated by the father of prosecutrix and the prosecutrix, nor any source of date of birth mentioned in the admission register (Ex.-P/8C). PW-9 Ganguram, Head Master, produced the admission register of the school. In admission register there is entry of the name of the prosecutrix at serial No. 86, according to which, her date of birth is 11.12.1982 and the prosecutrix was admitted in the concerned Institution. However, this witness (PW-9) has not stated as to on what basis the entry regarding date of birth of the prosecutrix was mentioned in the said register (Ex.-P/8C). Thus, Ex.-P/8C admission register has no evidentiary value and is of no help to the prosecution and cannot be said to be a reliable piece of evidence to determine the age of the prosecutrix. Even the prosecution did not attempt for ossification test of the prosecutrix and no reason for this has been given. In view of the above, it is clear that the prosecution utterly failed to prove that on the date of incident, the prosecutrix was below the age of 18 years, by adducing cogent and reliable evidence as required under the law.

22. So far as conviction under Section 363 of IPC is concerned, on the same set of evidence, the trial Court has acquitted the appellant of the charges under Sections 366 & 376 of IPC. The prosecutrix (PW-6) in the case diary statement (Ex.-D/1) has stated that she was having love affair with the appellant prior to six months from the date of incident and both were secretly talking with each other. She further stated that she kept the photograph of

the appellant in her purse which was seen by her mother and she (prosecutrix) informed about the same to the appellant. She further stated in her case diary statement that on 26.08.1997 appellant Manoj asked her to meet outside the village in the evening, then at about 06:00 pm on the pretext of attending the call of nature, she went there and the appellant met her near the canal. Thereafter, both had gone by foot to the house of maternal uncle of the appellant at village Kodwa. She stated that while they going to village Kodwa, on the way outside village Kowdwa near the culvert, the appellant had committed sexual intercourse with her. But, the prosecutrix (PW-6) stated different story in her court evidence. She stated that on the date of incident when in the evening she went to answer the call of nature, the appellant came there, caught hold of her from behind and on the point of knife he took her on foot to the house of his maternal uncle. She stated that before reaching village Kodwa near the canal, he committed sexual intercourse with her. PW-6 further stated in para-25 that the appellant while committing sexual intercourse with her, she sustained injuries on back and hip. As per report (Ex.-P/16) of PW-14 Dr. Suniti Mangrulkar who examined the prosecutrix (PW-6), no any external injury was found on the body of the prosecutrix, nor sign of any external injury on genitalia was found. There are major contradictions or omissions in the court evidence and the case diary statement (Ex.-D/1) of the prosecutrix. Thus, the conduct of the prosecutrix (PW-6) clearly show that she was a consenting party and she left her parental house willingly. Even the prosecution has not adduced any evidence to show that the prosecutrix was kidnapped or abducted by the appellant from the lawful guardianship, therefore, no offence under Section 363 of IPC is made out against the appellant.

23. In the facts and circumstances of the case, this Court is of the considered opinion that the trial Court has not appreciated the evidence of the witnesses in its proper perspective and committed an error in convicting the appellant

under Section 363 of IPC.

24. For the foregoing reasons and discussions as also keeping in view of the judgment of this Court in the matter of *Shivcharan Alias Jarha* (supra), the appeal is allowed. The conviction and sentence awarded to the appellant under Section 363 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. It is also stated that the appellant is on bail, 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