

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 517 of 2003

- Dinaram S/o Mehettar Sinha, aged about 23 years, Caste- Kalar, R/o Village Devbhog, P.S. - Devbhog, District Raipur (C.G.)

---- Appellant

Versus

- State of Chhattisgarh through Police Station Devbhog, District Raipur (C.G.)

---- Respondent/State

For Appellant	:	Shri S.P. Sahu, Advocate
For Respondent/State	:	Shri Ashish Gupta, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

21.01.2020

1. This appeal arises out of the judgment of conviction and order of sentence dated 29.03.2003 passed by the Special Judge, Special Court, Raipur (C.G.) in Special Sessions Case No. 98 of 2002, 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.1,000/-, in default of payment to further undergo R.I. for two months
Under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'Special Act')	R.I. for one year and pay a fine of Rs.500/-, in default of payment to further undergo R.I. for one month
Both sentences to run concurrently	

2. Facts of the case, in brief, are that on 11.03.2002, a report was lodged by PW-2 Mandhar (father of the prosecutrix) about missing of the prosecutrix (PW-1), in the police station Devbhog, Raipur which was recorded in *Roznamcha Sanha* vide Ex.-P/10C. As per *Roznamcha Sanha*, on 09.03.2002 the prosecutrix aged about 17 years, from 06:00 pm had gone to attend marriage function in the house of Punaouram and she did not return

to home thereafter. At about 07:00 pm, PW-2 went to the house Punaouram and inquired about the prosecutrix, but she was not there and without informing, she had gone to somewhere. PW-2 also gave description of her daughter in the *Roznamcha Sanha*. During search of the prosecutrix, the accused himself alongwith the prosecutrix approached police station Devbhog vide Ex.-P/8 (recovery memo). Regarding caste of the prosecutrix document Article 'A' (caste certificate) was seized vide Ex.-P/2. The prosecutrix (PW-1) was medically examined by PW-4 Dr. Uma Paikra and she gave her report Ex.P/4. As per report (Ex.-P/4), Doctor mentioned that no sign of any injury was found on the body of the prosecutrix regarding sexual intercourse. According to the Doctor, no definite opinion could be given regarding rape upon the prosecutrix but she was habitual to sexual intercourse.

3. Ex.-P/5 spot map was prepared by Patwari PW-5 Jeevan Sahu. Regarding age of the prosecutrix (PW-1), *Kotwari-panji* was seized vide Ex.-P/7C and admission register was also seized vide Ex.-P/11C and in both the documents, the date of birth of the prosecutrix was written as 19.12.1985
4. After completion of investigation charge-sheet was filed by the police for the offence under Sections 363, 366 & 376 of IPC and Section 3(1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against the accused. While framing the charge, the Special Judge framed the charges against accused/appellant under Sections 363, 366 & 376 of IPC read with Sections 3(2)(v) of the Special Act and Section 3(1)(xii) of the Special Act.
5. So as to hold the accused/appellant guilty, the prosecution examined 11 witnesses i.e. prosecutrix (PW-1), Mandhar (PW-2), Bhokuram (PW-3), Dr. Uma Paikra (PW-4), Jeevan Sahu (PW-5), Kumbhkaran (PW-6), Ajay Kumar Verma (PW-7), Ghanshyam Singh Kashyap (PW-8), I.R. Sahu (PW-9), Dr. Arun Kumar (PW-10) and U.S. Dubey (PW-11) 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 he had not forcibly taken the prosecutrix with him, but the prosecutrix herself compelled him to live with him and she went with him out of her own will.

6. After appreciation of the evidence available on record, the learned Special Judge, Raipur (C.G.) by the impugned judgment, while acquitting the appellant of the charges under Sections 366 & 376 of IPC and 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 the prosecutrix has studied upto 5th Class and her age was not proved by the prosecution. He submits that no sign of forcible sexual intercourse was found on the body of the prosecutrix and since the prosecutrix was a consenting party, the Special Court has acquitted the appellant of the charges under Sections 366 & 376 of IPC and Section 3(2)(v) of Special Act. Therefore, in these circumstances, conviction of the Appellant under Section 363 of IPC and Section 3(1)(xii) of the Special Act is not sustainable and he deserves to be acquitted of the said charge. He also submits that looking to the documents Ex.-D/1 to D/3 and case diary statement Ex.-D/4, it is clear that she had attained the age of discretion and was capable of understanding her wellbeing whereas she spent sufficient time with the appellant from 09.03.2002 to 26.03.2002. He further submits that the prosecutrix never raised alarm during her stay with the appellant and did not inform anybody regarding the incident. Therefore, she was a consenting party as she has a love affair with the appellant for a long time. He submits that no any coercion or inducement or threatening was given by the appellant to the prosecutrix. Therefore, the trial Court has wrongly convicted the appellant under Section 363 of IPC and Section 3(1)

(xii) of the Special Act.

8. On the other hand, learned counsel for the State vehemently opposes the contention made by learned counsel for the appellant. He submits that according to the *Kotwari-panji* (Ex.-P/7C) and admission register (Ex.-P/11C) as also the statement of PW-2 Mandhar (father of the prosecutrix), the age of the prosecutrix was 16-17 years at the time of incident. He also submits that since the minor girl belonging to scheduled tribe was taken away by the appellant without consent of her parents, the learned Special Court has rightly convicted and sentenced the accused/appellant for offence under Sections 363 of IPC and Section 3(1)(xii) of the Special Act, therefore, the impugned judgment of the Special Court needs no interference by this Court.
9. Heard learned counsel for the parties and also perused the records of the Special Court.
10. It is clearly proved by the prosecution that as per *Kotwaripanji* (Ex.-P/7C) which was proved by PW-6 Kumbhkaran (Kotwar), the age of the prosecutrix (PW-1) was mentioned as 19.12.1985 in the *Kotwaripanji* and that entry was made on 22.12.1985. Ex.-P/7C was the official record of the Kotwar who mentioned the date of birth of the prosecutrix on the information given by PW-2 Mandhar, father of the prosecutrix, therefore, there is no reason to disbelieve the document Ex.-P/7C. Ex.-P/11C is the admission register of the prosecutrix which was proved by PW-8 Ghanshyam Singh Kashyap who is teacher in the school where the prosecutrix was admitted for studying. PW-8 has stated that when the prosecutrix was admitted in the school, the entry was made in admission register at serial No. 977 in which her name, her father's name, caste, her date of birth as 19.12.1985 etc were mentioned. Therefore, in view of both the documents i.e. Ex.-P/7C and Ex.-P/11C including the statement of prosecutrix's father PW-2 who in para-5 of his deposition states that the age of the prosecutrix was 17 years at the time of incident, the prosecution has proved beyond reasonable doubt that on the

date of incident the prosecutrix was below 18 years. In the present case, the prosecutrix (PW-1) went missing on 09.03.2002.

- 11.** PW-1 prosecutrix has stated in paras 2, 3 & 4 that the appellant was driving the tractor in which she was doing the work of labour. She further stated that on the date of incident, when she went to answer the call of nature, the appellant met her in the field and told her to go with him, he will keep her as his wife but she refused to do this. Then, the appellant forcibly took her to Raidhar in the house of his maternal uncle where the prosecutrix was kept by the appellant. PW-1 has further stated that both the appellant and the prosecutrix stayed at Raidhar for about 9-10 days and during this period, 5-6 times the appellant has made sexual relations with her. PW-1 has also stated that she returned to Devbhog from Raidhar with the appellant. Thereafter, she lodged the report in police station and at the time of lodging the report, the appellant was also there.
- 12.** Looking to the statement of the prosecutrix (PW-1), she also admitted that Ex.- D/1 and Ex.-D/2 letters were written by her, but when the question was put to her as to whom she had written these letters, she denied to have written these letters. She also admitted the photograph (Ex.-D/3) of appellant with her, but she stated that on request of the appellant, she gave her consent to take her photo with the appellant. In para-11, PW-1 has also stated that she told the appellant at Raidhar that she is missing her parents, therefore, drop her home, on which the appellant returned from Raidhar to Devbhog with the prosecutrix on foot. During the period of journey from 09.02.2002 to 26.03.2002, the prosecutrix did not raise any alarm or make complain at Raidhar where she stayed with the appellant in house of his maternal uncle whereas she (prosecutrix) had sufficient time and opportunity to complain about her forcible kidnapping/abduction but she did not do so. As per Ex.-D/4 case diary statement of the prosecutrix, she has also mentioned this fact that she alongwith the appellant first reached at

Chandahandi (Odisha), from where they went to Raidhar on foot. From the place where the marriage function was going on 09.03.2002, the prosecutrix and the appellant had gone to different places and on the request of prosecutrix, the appellant came back again at the parental home of the prosecutrix on 26.03.2002..

13. The entire evidence of the prosecutrix (PW-1) as also looking to the entire conduct of the prosecutrix, it stands proved that as per pre-plan of the prosecutrix with appellant, she left her parental house willingly and had gone with accused/appellant to Chandahandi (Odisha) and from Chandahandi to Raidhar on foot. During her stay with the appellant, she had an opportunity to disclose these facts that the accused has abducted her and committed forcible sexual intercourse upon her in the house of maternal uncle of the accused but she did not do so. It is clear that the prosecutrix (PW-1) was in love with the accused. As per Ex.-P/4 report of PW-4 - Dr. Uma Paikra, there is no evidence of forcible sexual intercourse and the prosecutrix is found to be habitual to sexual intercourse. There is also no evidence that the prosecutrix was under threats or coercion or inducement of the appellant. Entire conduct of the prosecutrix (PW-1) clearly shows that she was a consenting party. The Special Court has given finding that the prosecutrix and the appellant both were in love with each other and she was a consenting party, therefore, this Court also agrees with the finding of the Special Court.

14. The Hon'ble Supreme Court in the matter of ***State of Haryana v. Raja Ram, AIR 1973 SC 819*** considering the fact that the prosecutrix, a minor girl was taken away by the accused on persuasion of giving her luxurious life, from the lawful guardianship of her parents, held that the consent given by the minor girl upheld the conviction of the accused under Section 366 of IPC.

15. In the present case also as discussed above, the prosecution has successfully proved on the basis of oral and documentary evidence on

record that the prosecutrix below 18 years on the date of incident. Even if she had given consent to the accused/appellant for accompanying him, such consent is of no consequence in view of the decision of the Hon'ble Supreme Court in *Raja Ram* (supra). Therefore, conviction of the appellant under Section 363 of IPC recorded by the Special Court being just and proper needs no interference by this Court.

16. So far as under Section 3(1)(xii) of the Special Act is concerned, considering the deposition of the prosecutrix, the fact that she visited several places with the appellant, also had photograph with him as per Ex.-D/3, at no point of time she raised any alarm or protest the act of the appellant or complained to anyone about her alleged abduction or sexual assault by the appellant and further on her request only, the appellant returned to her parental house alongwith her, it cannot be said that the appellant was in a position to dominate the will of the prosecutrix who belongs to scheduled caste community. Rather, from overall evidence it appears that the prosecutrix had accompanied the appellant out of her own free will, in these circumstances the evidence under Section 3(1)(xii) of the Special Act is not made out against the appellant and the same is liable to be set aside.

17. As regards, the sentence under Section 363 of IPC, considering the fact that the appellant was 23 years of age at the time of the incident, he has no criminal antecedent, the appellant and the prosecutrix were in love with each other, the prosecutrix voluntarily visited several places with the appellant and also stayed at his maternal uncle's house for about 9-10 days without any resistance, on her own request, the appellant brought her back to her parental house, the incident took place around 17 years back, the appellant has already remained in jail about five months & one week and is on bail since 28.04.2003, the judgment of the Hon'ble Supreme Court in the matter of ***George Pon Paul Vs. Kanagalet and Others, (2009) 13 SCC 478*** wherein considering the fact that fine amount has been deposited and paid

to the victim as also the long passage of time, the accused was sentenced to the period already undergone, this Court is of the opinion that in the present case also no useful purpose would be served in again sending him back to jail at this stage and the ends of justice would be served if he is sentenced to the period already undergone by him while keeping the fine sentence with default stipulation intact.

18. In the result, the appeal is allowed in part. The conviction and sentence awarded to the appellant by the Special Court under Section 3(1)(xii) of the Special Act are set aside and he Appellant is acquitted of the said charge framed against him. While maintaining the conviction of the appellant awarded by the Special Court under Section 363 of IPC, he is sentenced to the period already undergone by him, however, the fine amount imposed on him with default sentence by the Special Court shall remain intact. The appellant is reported to be on bail, therefore, his bail bonds shall remain in force 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