

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1020 of 2008**

- Gameshwar, Son of Dillip Kumar Tandan, aged about 20 years, R/o Village Janglor, Police Station Palari, District Raipur, C.G.

----Appellant**Versus**

- State of Chhattisgarh, Through the Police Station Palari, District Raipur, C.G.

---- Respondent

For Appellant
For Respondent/State

Shri R.K. Pali, Advocate.
Shri V.P. Banjare, Deputy Government Advocate.

Hon'ble Shri Justice Gautam Chourdiya**Judgment on Board****06/11/2020**

1. The appeal is heard through Video Conferencing.
2. This appeal arises out of the judgment of conviction and order of sentence dated 14.11.2008 passed by the 2nd Additional Sessions Judge, Baloda-Bazar, District Raipur, C.G. in Sessions Trial No.23/2008, whereby the appellant stands convicted and sentenced as under:-

Conviction	Sentence
Under Section 376 of Indian Penal Code (hereinafter referred to as the 'IPC')	Rigorous Imprisonment for three years and fine of Rs.3,000/-, in default of payment of fine to further undergo Rigorous Imprisonment for nine months

Under Section 450 of Indian Penal Code	Rigorous Imprisonment for three years and fine of Rs.3,000/-, in default of payment of fine to further undergo Rigorous Imprisonment for nine months
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(Both sentences were directed to concurrently)

3. Case of the prosecution, in brief, is that on 01.07.2008 FIR Ex.P-1 was lodged by the prosecutrix, aged about 17 years, alleging in it that on the date of incident i.e. 30.06.2008 when she was all alone at her home, at that time accused/appellant entered her home, caught hold of her and committed forcible sexual intercourse with her and the accused/appellant promised the prosecutrix that he would marry her. She also alleged that prior to the incident on the pretext of marrying her, the accused/appellant made physical relations with her on number of occasions. On the same day i.e. 30.06.2008, when she went to live in the home of accused/appellant as his wife, then his (appellant's) elder brother expelled her from home. Then, she tried to commit suicide but her maternal grandmother came there and stopped her. Thereafter, on the next day i.e. 01.07.2008, she went to the police station, Palari and lodged the FIR Ex.P-1 against the accused/appellant. During investigation, one underwear of the prosecutrix was seized vide Ex.P-3. Spot Map Ex.P-4 was prepared. Kotwari Panji was seized from village Kotwar vide Ex.P-6. One underwear of accused/appellant was seized vide Ex.P-6. One birth report form was seized vide Ex.P-8C. Accused/appellant was arrested on 02.07.2008 vide Ex.P-9. After recording statements of the witnesses, charge sheet was filed

against the appellant under Section 376 of IPC. The trial Court framed the charges under Sections 450 and 376 of IPC against the appellant which were denied by him and he prayed for trial.

4. So as to hold the accused/appellant guilty, the prosecution examined as many as 5 witnesses i.e. PW-1 Prosecutrix, PW-2 Raj Bai Tandon, PW-3 Prem Das, PW-4 Heeral Lal and PW-5 Bhushan Banjare. 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. However, no witness was examined by him in his defence.
5. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned above.
6. Learned counsel for the appellant submits that appellant has been falsely implicated in this case. He also 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 submits that there is no legally admissible evidence available on record in respect of the age of the prosecutrix and that looking to her conduct and physical appearance, it can be said that on the date of incident she was major. He also submits that there are major contradictions and omissions in the statements of prosecutrix and other witnesses.

He further submits that neither medical report was proved or produced before the trial Court nor any independent witness has supported the prosecution case. He submits that the statement of the prosecutrix is wholly unreliable considering the overall evidence on record, therefore, it is clear that if there was any sexual intercourse between the appellant and the prosecutrix, she was a consenting party to that act. Therefore, the impugned judgment of conviction and order of sentence deserves to be set aside and the appellant be acquitted of the said charges.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction and sentence of the accused/appellant are strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
8. Heard learned counsel for the parties and perused the material available on record.
9. First, this Court shall examine whether on the date of incident, the age of the prosecutrix was above 16 years or not ?
10. The incident happened in the year 2008 and at that time the age for consent was 16 years. As per Ex.P-8, Kotwari Panji, date of birth of prosecutrix is mentioned as 26.09.1991 but name of the prosecutrix is wrongly mentioned in that document. Apart from that there is no evidence adduced by the prosecution to prove the specific date of birth of the prosecutrix. In record of the trial Court

at page No.28, one photo-copy of mark-sheet of middle school of prosecutrix is there where her date of birth is mentioned as 27.07.1991 but that document is unexhibited. However, the parents of the prosecutrix have also not been examined by the prosecution. Further, Prosecutrix herself admitted in her deposition that she was having affair with the appellant prior to lodging of the FIR and she has no knowledge when they first physically came in contact with each other. Therefore, looking to the statement of PW-1 Prosecutrix and the documents available on record, it cannot be presumed or proved that the prosecutrix was below the age of 16 years at the time of incident.

11. PW-1 Prosecutrix admitted in her deposition that she was having love affair with the appellant prior to lodging of the FIR and they wanted to marry. She stated in para 31 of her deposition that first accused/appellant wrote love letter Ex.P-5 to her stating that he wants to marry her but since they belong to the same family their marriage could not be performed. She also admitted that 5-6 months prior to recording of her deposition which was recorded on 4th October, 2008, accused/appellant had written love letter Ex.P-5. She also admitted in her deposition that she had also written love letters to accused/appellant vide Exs. D-1 and Ex.D-2. She admitted in para 29 of her deposition that appellant had told her that he would marry her. She also stated in para 18 of her deposition that she was having a love affair with accused/appellant since last one year and accused/appellant told her that he would marry her. She also admitted in para 17 that their family members

were acquainted with each other and she never disclosed their physical relations to anybody.

12. PW-2 Rajbai Tandan, is the maternal grandmother of the prosecutrix. She stated in her deposition that appellant's grandmother called her (this witness) and told her that *take the prosecutrix to your home*. Thereafter, she persuaded prosecutrix and took her home. On the way, prosecutrix told her that appellant had promised her to marry. She also stated that family members of the appellant had used filthy language against prosecutrix.

13. PW-3 Prem Das is the village Kotwar. He is the witness of seizure of Kotwari Panji Ex.P-6 and Ex.P-7 Kotwari Supurdnama. He stated in his deposition that he had given the Kotwari paper to police and also stated that according to him the date of birth of the prosecutrix was 26.09.1991.

14. PW-4 Heeral Lal is also the witness of seizure of Kotwari Panji Ex.P-6.

15. PW-5 Bhusan Banjare is the witness of seizure memo Ex.P-3 and arrest memo Ex.P-9.

16. As per Ex.P-5 and Article-A, love letters written by the appellant to the prosecutrix (PW-1), it is clear that he was having affair with the prosecutrix for a long time but in these letters no fact is mentioned about their physical relations and as per Ex.D-1 and Ex.D-2, letters written by the prosecutrix (PW-1) to the appellant she also admitted that she was in love with the appellant and

appellant was ready to marry her. In these letters, she has nowhere stated anything about the commission of rape by the appellant.

17. In the matter of ***Rajesh Patel vs State of Jharkhand*** reported in **(2013) Volume 3 SCC 791**, the Hon'ble Supreme Court considering the fact that there was inordinate and unexplained delay of 11 days in lodging the report, non-examination of the treating Doctor and the Investigating Officer, the testimony of the prosecutrix which was most unnatural and improbable to believe, acquitted the appellant of the charge under Section 376 of IPC holding that the defence case of consensual sex seems probable in the given facts and circumstances of the case.

18. In the present case, looking to the entire evidence available on record, in particular that of the prosecutrix, it emerges that appellant and prosecutrix were having love affair prior to lodging of the FIR and there had been physical relations between the appellant and the prosecutrix on number of occasions and at that time no complaint was made by the prosecutrix that the appellant committed sexual intercourse against her will. However, she herself admitted in para 27 of her deposition that she has no knowledge when first time appellant committed sexual intercourse with her. Also, nothing comes from the record that on the pretext of marriage appellant had committed sexual intercourse with her. At no point of time, she disclosed the fact to anyone that there had been physical relations between the appellant and the prosecutrix

on number of occasions. Further, Prosecutrix was unable to state the date or month when appellant committed sexual intercourse with her. No any fact is mentioned in Article-A & Ex.P-5, letters written by the appellant and Ex.D-1 & Ex.D-2, letters written by the prosecutrix, about their physical relations. When prosecutrix went to the home of appellant to live as his wife and appellant's elder brother expelled her from home, then she went to the police station and lodged the FIR Ex.P-1 against the appellant. Further, in this case prosecutrix was medically examined by the Medical Officer but that document is neither exhibited nor produced before the trial Court. Also, no Investigating Officer has been examined by the prosecution in this case nor any FSL report proved or produced by the prosecution before the trial Court. In these circumstances, keeping in view the judgment in the matter of ***Rajesh Patel (supra)***, it cannot be said that sexual intercourse between them was per force or against her will or without her consent, rather it appears to be a peaceful affair with the consent of the prosecutrix. This being the position, the appellant can, by no stretch of imagination, be held guilty of the offence under Sections 376 and 450 of IPC, as has been held by the trial Court, and he deserves to be acquitted of the said charges by extending him benefit of doubt.

19. In the result, the appeal is allowed. The impugned judgment is set aside and the appellant is acquitted of the charges under Sections 376 and 450 of IPC by giving him benefit of doubt.

The appellant is reported to be on bail, therefore, his bail

bonds shall continue for a period of six months from today in view of provisions of Section 437-A of Cr.PC.

**Sd/-
Gautam Chourdiya
Judge**

Akhilesh