

NAFRHIGH COURT OF CHHATTISGARH, BILASPURCRA No. 298 of 2011

- Supadilal Kushwaha, Aged about, 22 years, S/o- Shri Brijraj Kushwaha, R/o- village- Rajbahar Patiyadand, P.S.- Bhaiyathan, District- Surguja (C.G.) ---- **Appellant**

Versus

- State of Chhattisgarh, through- S.O.- Darima, District- Surguja (C.G.) ---- **Respondent**

For Appellant : Ku. Preeti Jha, Advocate appears as
Amicus Curiae.

For State/Respondent : Smt. Shubha Shrivastava, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma

Judgment on Board

24/01/2020

1. This appeal is preferred against the judgment dated 15th March, 2011 passed by 3rd Additional Sessions Judge (F.T.C.), Surguja (Ambikapur) (C.G.) in Sessions Trial No. 299/2010 wherein the said Court convicted the appellant for commission of offence under Section 363 of the Indian Penal Code (for short the 'IPC'), 1860 and sentenced him to undergo rigorous imprisonment for four years and fine of Rs. 500/- with default stipulation.
2. In the present case, the prosecutrix is (PW-1). As per version of the prosecution, prosecutrix was minor on the date of incident i.e. on 11th February, 2010. When she was residing with her parents on the date of incident, the appellant came to her home and enticed her away on promise of marriage and took her to village- Rajbahra. It is alleged that during stay in his house the appellant

committed rape on her. The matter was reported and investigated, appellant was charge-sheeted and convicted as mentioned above.

3. Learned counsel for the appellant submits that there is no evidence regarding minority of the prosecutrix. The trial Court has already recorded finding that the prosecutrix was consenting party for moving with the appellant. Finding of the trial Court is not challenged, therefore, same is attained finality. When the age of the prosecutrix is not established to be below 18 years and she was consenting party, no offence is made out against the present appellant, therefore, finding of the trial Court is liable to be set aside.
4. On the other hand, learned State counsel submits that finding of the trial Court is based on proper marshaling of evidence which is not required to be interfered while invoking jurisdiction of the appeal.
5. I have heard learned counsel for the parties and perused the record of the Court below wherein judgment has been passed.
6. The question for consideration of this Court is whether the prosecutrix was minor on the date of incident i.e. on 11th February, 2010. No birth certificate was produced before the trial Court regarding age of the prosecutrix. No school certificate was proved by examination of person who admitted the prosecutrix in primary school, Karji. No radiological examination was done to ascertain the age of the prosecutrix.

7. Surajnath (PW-3), who is father of the prosecutrix has not deposed regarding date of birth or age of the prosecutrix. He deposed (Para-5) that he is not able to tell the date of birth of the prosecutrix. Though as per statement of Assistant Sub-Inspector Shivvrat (PW-6) one school certificate was seized in the present case of primary school, Karji, but no one examined before the trial Court to prove the age of the prosecutrix on the basis of that certificate. No one examined from school to prove the certificate and no one examined who admitted the prosecutrix in the school. In absence of examination of witnesses from school, the school certificate is not proved and, therefore, there is no evidence to record finding that the prosecutrix was minor on the date of incident. The trial Court has already recorded finding that the prosecutrix was consenting party for moving with the appellant and that finding is not challenged, therefore, it is a case of moment of the prosecutrix who is a major with the appellant. In view of the above, charge under Section 363 of the IPC, 1860 is not established against the present appellant.
8. Accordingly, the appeal is allowed. Conviction and sentence of the appellant for commission of offence under Section 363 of IPC, 1860 is hereby set aside and he is acquitted of the said charge framed against him.

Sd/-
(Ram Prasanna Sharma)
Judge