

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 732 of 2006**

- Janu @ Vikash, S/o Ajay Chouhan, aged about 19 years, Occupation- Shopkeeper, R/o Purana Machhali Market, Chouhan Kirana Store Supela, P.S. Supela, District- Durg (C.G.).

---- Appellant**Versus**

- State Of Chhattisgarh Through Police Station -Dondi Lohara, District- Durg (C.G.).

---- Respondent

For Appellant	: Shri R.K.Jain, Advocate
For Respondent/State	: Shri Vimlesh Vajpayee, G. A.

Hon'ble Shri Gautam Chourdiya, J**Judgment On Board****22/09/2020**

Proceedings of the matter have been taken-up through video conferencing.

1. This appeal arises out of the judgment of conviction and order of sentence dated 20.09.2006 passed by the Special Judge & Additional Sessions Judge, Durg C.G. in Sessions Trial No. 05/2005, convicting the accused/appellant under Section 363 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for two years and to pay fine of Rs.1,000/-, in default whereof to suffer additional imprisonment for six months.

2. Case of the prosecution, in brief, is that on 03.11.2004, at around 12.15 pm from the Government Middle School, Supela, District Bhilai the prosecutrix, aged about 13 years, studying in class 6th was coaxed by the present appellant and taken to Matri Garden, Bhilai without prior permission of her parents or any of the family members of the prosecutrix. FIR (Ex.P-1) was lodged by the mother of the prosecutrix on the same day of incident i.e. 03.11.2004. Spot map was prepared vide Ex. P/2. During investigation, prosecutrix was recovered from Matri garden, Bhilai from the custody of the accused/appellant vide Ex. P/5. The mark-sheet of the prosecutrix was also seized vide Ex. P/3 and in which, date of birth of the prosecutrix is mentioned as 16.12.1988.

3. After usual investigation, charge-sheet under Sections 363, 364 & 365 of IPC was filed against the accused/appellant. After filing of charge-sheet, trial Judge framed charge against the accused under Sections 363, 364 & 366 of the Indian Penal Code. Accused denied the charges framed against him and prayed for trial.

4. So as to hold the accused/appellant guilty, the prosecution examined as many as 13 witnesses namely- Mother of the prosecutrix (PW-1), Kedarnath Sahu (PW-2), Smt. Janabai (PW-3), Ravishankar Verma (PW-4), Sabeena Parveen (PW-5), C. P. Sharma (PW-6), Smt. S. K. Minj (PW-7), Sumit Kumar Sahu (PW-8), Chandra Shekhar Vishvkarma (PW-9), Chandrakant (PW-10), Nirbhay Singh (PW11), A. N. Giri (PW12) and the prosecutrix (PW13). Statement of the accused 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. The accused/appellant has taken a defence that he has been falsely implicated in the crime in question as the prosecutrix herself had requested him to come to the said garden, that is why he went there and the prosecutrix came with him with her own will. The two defence witnesses namely- Ajay Kumar Chauhan (DW-1) & Ratan Vashanav (DW-2) have been examined on behalf of the appellant/accused.

5. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment, acquitted the accused/appellant of the offences under Sections 364 & 366 of IPC whereas convicted and sentenced the accused/appellant under Section 363 of the Indian Penal Code.

6. Learned counsel for the appellant submits that in this case the age of the prosecutrix was not proved and established by the prosecution by adducing any specific evidence regarding her date of birth either by the prosecutrix or by her parents. He submits that mark-sheet of the prosecutrix, which was seized by the Investigating Officer, has not been duly proved by the Dakhil Kharij Register and, therefore, the fact that the prosecutrix was below the age of 18 years at the time of incident, has not been duly proved by the prosecution. He also submits that the prosecutrix wants to marry with the appellant and she called him first to meet at Matri garden, that is why he went there and the prosecutrix and her parents have falsely implicated him in the offence. He alternatively submits that if this Court comes to the conclusion that the appellant is guilty of the offence under Section 363 of IPC, considering the fact that the incident occurred on 03.11.2004,

near about 16 years lapsed and the manner in which the offence is said to have been committed, the age of the appellant i.e. 19 years at the relevant time and he remained in jail for about 59 days (approximate two months), it would be expedient in the interest of justice give him benefit of the Probation of Offenders Act, 1958 or the sentence imposed on him may be reduced to the period already undergone by him (appellant).

7. On the other hand, while supporting the impugned judgment, it has been argued by the State counsel that in this case as per statement of Ravishankar Verma (PW-4), who is Head Master of the Govt. Primary School, Supela he has proved the date of birth of the prosecutrix as 16.12.1988. He also signed the seized document (Marksheet) vide Ex. P/3 and his statement remained un-controverted in cross-examination. Thus, at the time of incident, the prosecutrix was below 18 years of age and this fact is proved beyond all reasonable doubt. He further submits that prosecutrix (PW13) has specifically stated in paragraph two of her statement that in the school the present accused caught hold of her hand and took her to Supela and from there he took her to Matri garden against her will. There is no evidence adduced by the appellant to prove the fact that he had taken the prosecutrix from the lawful guardianship of her parents with their consent, therefore, the learned trial Court has rightly convicted and sentenced the accused/appellant for the aforesaid offences.

8. Heard counsel for the respective parties and perused the material on record.

9. Prosecutrix (PW-13) has specifically stated in her evidence that

at the time of incident she was aged about 14-15 years. Mother of the prosecutrix (PW02) has stated in her evidence that during investigation, the Investigating Officer seized the mark-sheet of the prosecutrix. The aforesaid evidence of this witness remained uncontroverted in her cross-examination. Nirbhay Singh (PW11), Investigating Officer seized the mark-sheet of Primary School (Ex. P/3) and has proved the same which bears the date of birth of the prosecutrix as 16.12.1988. Such certificate vide Ex. P/3 has also been duly proved by Ravishankar Verma (PW04), Head-Master of the Govt. Primary school, Supela where the prosecutrix studied. Thus, from the aforesaid evidence of the witnesses, it stands prove beyond all reasonable doubt that the prosecutrix was below 18 years of age on the date of incident.

10. Now this Court has to see whether the prosecutrix was taken away by the appellant from the lawful guardianship of her parents without their consent. As per statement of mother of the prosecutrix (PW01), peon of the school of prosecutrix was informed her that her daughter was taken away by 2-3 boys forcibly and that information verified by her from the Principal Smt. S.K. Minj of the Govt. Higher Secondary School, Supela, who informed her that the prosecutrix was taken away by 2-3 boys.

Smt. S. K. Minj (PW07) stated in her evidence that she had received information that one girl of her school was taken away by one boy. After receiving such an information, she sent one peon namely Jana Bai (PW-03) to the mother of the prosecutrix for giving the said information.

11. Sumeet Kumar Sahu (PW-08) is the independent witness in this case and in his presence, at Matri garden the prosecutrix was recovered with the accused. He has proved & signed the recovery panchnama (Ex. P/5).

12. The two defence witnesses namely Ajay Kumar Chouhan (DW-1) & Ratan (DW-2) have stated in their evidence that the prosecutrix herself called the accused/appellant at Matri garden *whereas* Jana Bai (PW-3)-Peon of the school has stated in her evidence that some boys had taken away the prosecutrix from the school forcibly and the said version was supported by Smt. S. K. Minj (PW-7).

13. Close scrutiny of evidence makes it clear that the prosecutrix was recovered from the custody of the present accused and the appellant has also admitted in his statement recorded under Section 313 Cr.P.C. that at the time of incident, the prosecutrix was with him. It is also proved by the evidence of the prosecution witnesses that at the time of incident the prosecutrix was below 16 years of age. The appellant had taken a defence that he went to Matri garden on being called by the prosecutrix only and as such she was a consenting party. In support of this defence, the appellant has examined two witnesses namely- Ajay Kumar Chauhan (DW-1) & Ratan Vashanav (DW-2) who have stated that it is the prosecutrix who had asked the appellant to meet her at Matri garden and then only the appellant went there. However, from the evidence of the prosecutrix (PW13) which is corroborated by the evidence of Jana bai (PW13) and Smt. S. K. Minj (PW07) it is seen that the prosecutrix was forcibly taken away from the school by the appellant and admittedly, she was recovered from Matri

garden while in the company of the appellant.

14. Since from the over all evidence on record, as discussed above, it has already been proved that on the date of incident the prosecutrix was below the age of 16 years and there is nothing on record to show that she was taken away by the appellant with the prior permission of her parents from their lawful guardianship, rather her parents have stated that the appellant took away the prosecutrix with him forcibly, even if it is presumed that prosecutrix had given consent to the appellant for accompanying him, she being minor her consent was of no consequence. In these circumstances, the Trial Court has rightly convicted the appellant under Section 363 of the IPC which calls for no interference by this Court.

15. So far as the sentence part is concerned, as per documents available on record, the age of the appellant has all over been mentioned as 19 years and this fact has not been disputed by either of the parties. Section 6 of the Probation of Offender Act, 1958 deals with restriction on imprisonment of offenders under 21 years of age if the offender is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life). According to that section, the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied having regard to the circumstances of the case, the nature of the offence and the character of the offender it would not be desirable to deal with him under Sections 3 or 4 of the Probation of Offender Act, 1958. However, in this case, considering the facts & circumstances of the case giving rise to the incident, the age of the appellant at the relevant time i.e. 19 years,

the fact that he has already remained in jail for 59 days and has deposited the fine of Rs. 1,000/- imposed by the trial Court, the incident took place around 16 years back, the appellant has no criminal antecedent, the appellant is facing trial since 2005 and at present he is on bail, *keeping in view 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 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 sentence to the period already undergone by him.

16. Resultantly, the appeal is allowed in part. While, maintaining conviction of the appellant under Section 363 of IPC, he is sentenced to the period already undergone by him, however, the fine amount imposed upon him with default sentence by the First Additional Judge shall remain intact. The appellant is reported to be on bail, therefore, his bail bond shall remain in force for a period of six months from today in terms of provisions of Section 437A of Cr.P.C..

Sd/-
(Gautam Chourdiya)
Judge