

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 548 of 2006**

1. Santlal S/o Shri Ramkisum, aged about 20 years, R/o Banshipur, Out Post Bhatgaon, Police Station Pratappur, District Surguja (C.G.)

---- Appellant**Versus**

1. State of Chhattisgarh, through Police Station – Pratappur Bhatgaon, District Surguja (C.G.)

---- Respondent

For Appellant	:	Ms. Ranjana Jaiswal, Advocate.
For Respondent/State	:	Shri Anand Verma, Dy. Govt. Advocate.

Hon'ble Justice Shri Gautam Chourdiya**Judgment****24/06/2020**

- 1) The matter is heard through video conferencing.
- 2) This appeal is filed under section 374(2) of Code of Criminal Procedure, 1973 against the judgment of conviction and order of sentence dated 19/06/2006 passed by 2nd Upper Sessions Judge (F.T.C.), Surajpur (C.G.) in Session Trial No. 272/2005; whereby the appellant stands convicted and sentenced as under:-

Conviction	Sentence
U/s. 376(1) of Indian Penal Code (in short "IPC")	R.I. for 7 years & fine of Rs. 5,000/- in default of fine additional R.I. for 3 months.

- 3) Case of the prosecution in brief is that 7 months prior to the date of FIR i.e. 13/02/2005 when the prosecutrix went to the forest for grazing her cattle, the accused appellant having given promise of marrying her made sexual intercourse with her and continued to

do so thereafter also. On account of said act of the accused appellant the prosecutrix was carrying pregnancy of 2 months and when she told about the same to the accused appellant he told her to go for abortion. When the prosecutrix was 7 months pregnant, she asked the appellant to marry her but the appellant refused and thereafter FIR Ex. P-1 was lodged by her at the Police station. The prosecutrix was medically examined by PW-05 Dr. Shashi Tirkey vide Ex. P-3 who did not notice any injury on the body of the prosecutrix. The prosecutrix was found carrying pregnancy of 28 to 30 weeks, her secondary sexual characteristics were well developed. In her opinion the prosecutrix was habituated to sexual intercourse. Two vaginal slides were prepared for chemical examination. For age determination the Doctor advised for X-Ray of the prosecutrix. PW-09 Dr. M.K. Jain did X-Ray of the prosecutrix vide Ex. P-7 and found that the radiological age of the prosecutrix could be in between 14 & 16 years. Spot map Ex. P-3 and P-10 were prepared. The appellant was also medically examined by the Doctor vide Ex. P-13 and was found physically fit for sexual intercourse. Statements of the witnesses were recorded and after completing investigation charge sheet under Section 376 of IPC was filed against the accused appellant.

- 4) The Trial Court framed charge against the accused/appellant under Sections 376(1) which was denied by him and he prayed for trial.
- 5) The prosecution in support of its case examined as many as 12 witnesses namely PW-01 Prosecutrix, PW-02 Mulki @ Gulabi (mother of prosecutrix), PW-03 Bobby, PW-04 Ram Prasad (father of prosecutrix), PW-05 Dr. Smt. Sashi Tirkey, PW-06 Dr. S.L. Jaiswal, PW-07 Jhunnu Lal, PW-08 Chakke Lal, PW-09 Dr. M.K. Jain, PW-10 Dhanna Lal (Constable), PW-11 Yuvraj Singh (A.S.I.) and PW-12 Sanjay Singh (Patwari). The 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. No

witness was examined by the accused in his defence.

- 6) Learned Trial Court considering the material available on record by the impugned judgment convicted and sentenced the accused/appellant as mentioned above in para 2 of this judgment.
- 7) Learned counsel for the appellant submits that the appellant has been falsely implicated in this case. The prosecution has failed to prove on the basis of evidence adduced by it that on the date of incident the prosecution was a minor girl. There is inordinate delay of 7 months in lodging the FIR. There are material contradictions and omission in the statements of the prosecutrix and other witnesses which makes it clear that the appellant has been falsely implicated in this case. Even the medical evidence does not support the prosecution case. Therefore, the impugned judgment is liable to be set aside and the appellant shall be acquitted from the charge.
- 8) On the other hand learned counsel for the respondent/State supporting the impugned judgment submits that the Trial Court considering the overall evidence available on record has rightly convicted and sentenced the appellant by the impugned judgment which calls for no interference by this Court.
- 9) Heard counsel for the parties and perused the material available on record.
- 10) First this Court considers the age of the prosecutrix. According to the prosecution case the appellant had first physical relation with the prosecutrix about 7 months prior to 13/02/2005, meaning thereby in the month of July 2004. In the documents i.e., FIR, case diary statement of the prosecutrix, medical documents of the prosecutrix, the age of the prosecutrix is mentioned as 15 years. The evidence given by the prosecutrix, her mother PW-02 Mulki @ Gulabi and her father PW-04 Ram Prasad regarding the age of the prosecutrix are contradictory to each other. In these circumstances it would not be safe to rely upon such oral

evidence. As per the evidence of PW-06 Dr. S.L. Jaiswal who gave X-Ray report Ex. P-5 and PW-09 Dr. M.K. Jain who gave report Ex. P-7 according to which the radiological age of the prosecutrix was in between 14 & 16 years. The Trial Court in its judgment has elaborately dealt with the age of the prosecutrix in light of various judgments of the Hon'ble Supreme Court and the High Court and recorded a finding that the prosecutrix was more than 16 years of age in July 2004 when she was first subjected to sexual intercourse by the appellant. The aforesaid finding has not been challenged by the accused appellant. This Court after going through the entire oral and documentary evidence as well as the medical evidence is also of the opinion that on the date of incident the prosecutrix was more than 16 years of age.

- 11) PW-01 prosecutrix has categorically stated that prior to 1 year from recording of her evidence, when she used to go to forest for grazing her cattle, the accused appellant on the promise of marriage had sexual intercourse with her. She states that the appellant continued to have such physical relations with her on number of occasions on the promise of marriage as a result to which she got pregnant. When she was carrying pregnancy of 3 -4 months and asked the appellant to marry her, he refused. Thereafter, village Panchayat was convened where the appellant also refused to marry her and then she lodged FIR Ex. P-1 against the appellant. In para 20 she admits that she was having affair with the appellant. In para 25 she admits that if the appellant had given her money and married her, then she would not have lodged report.
- 12) PW-02 Mulki @ Gulabi, mother of the prosecutrix, states that when the prosecutrix was pregnant, village Panchayat was convened where the prosecutrix disclosed that she is carrying pregnancy due to sexual intercourse by the appellant. In para 7 she also admits that since the appellant did not agree for giving money in the Panchayat, a report was lodged against him.
- 13) PW-04 Ram Prasad, father of the prosecutrix, has also stated

that when the prosecutrix was pregnant, she was asked about the same by his wife on which she disclosed that it is because of the sexual intercourse by the appellant. Thereafter, village Panchayat was convened where the appellant refused to marry the prosecutrix and then report was lodged. He also admits in para 15 that had the appellant given money, report would not have been lodged against him.

- 14) PW-05 Dr. Sashi Tirkey medically examined the prosecutrix on 12/02/2005 vide Ex. P-3 and found that the secondary sexual characteristics of the prosecutrix were fully developed, there was no sign of injury on her body, she was carrying pregnant of 28-30 weeks, her vagina was easily admitting two fingers and she was habituated to sexual intercourse. She prepared two vaginal slides, sealed and handed over to the Police Constable for chemical examination. She advised for X-Ray for the prosecutrix for her age determination. PW-06 Dr. S.L. Jaiswal conducted X-Ray of the prosecutrix vide Ex. P-4 and Ex. P-5 and referred her to Radiologist for age determination. PW-09 Dr. M.K. Jain, Radiologist examined the prosecutrix and opined that her radiological age could be in between 14 & 16 years vide Ex. P-7.
- 15) PW-10 Dhanna Lal, Police Constable helped in the investigation. PW-11 Yuvraj Singh (A.S.I.) conducted investigation and supported the prosecution case. PW-12 Sanjay Singh, Patwari prepared the Spot Map vide Ex. P-3 and proved the same.
- 16) From the evidence of the prosecutrix PW-01, her parents PW-02 and PW-03 and other witnesses it is clear that while the prosecutrix used to go to the forest for grazing her cattle, the accused appellant had sexual intercourse with her on the promise of marriage and continued to do so for considerable time. On account of such act of the appellant, the prosecutrix became pregnant. When her pregnancy was visible, her parents inquired about the same from the prosecutrix on which she disclosed that it is due to physical relation with the appellant on the promise of marriage. Thereafter, the village Panchayat was

convened where the appellant refused to marry the prosecutrix. It has also come in the evidence of prosecution witness that had the appellant given money, they would not have lodged report against him. From the evidence on record it is crystal clear that it is the accused appellant who had sexual intercourse with the prosecutrix, a girl aged more than 16 years and below 18 years, on the promise of marriage and that is why the prosecutrix did not disclose about such act of the appellant for a considerable period of time to anyone.

- 17) In the given facts and circumstances of the case, this Court has to see whether the prosecutrix was a consenting party to the above act of the appellant. Section 90 of IPC deals with consent given under fear or misconception.

“90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age”

- 18) From a bare reading of Section 90 of IPC it is clear that the consent given by a person under fear of injury or misconception of fact is no consent under the law. In the present case also, as discussed above, though the prosecutrix was having physical relations with the appellant for a considerable time but such consent was given by the prosecutrix only on the promise by the appellant to marry her. The evidence goes to show that the appellant was well aware and had a reason to believe that the consent obtained from the prosecutrix for sexual relations was in consequence of his promise to marry her. The Trial Court in its judgment has elaborately dealt with the consent of the

prosecutrix in light of provisions under section 90 of IPC and various judicial pronouncements of the Hon'ble Supreme Court and the High Courts. This Court finds no illegality or infirmity in the findings so recorded by the Trial Court.

- 19) On the basis of aforesaid discussions, this Court is of the opinion that the Trial Court has rightly held the appellant guilty under section 376(1) of IPC based on the evidence adduced by the prosecution. Therefore, there is no substance in this appeal.
- 20) In the result, the appeal being without any substance is liable to be dismissed and is, accordingly dismissed. As per Jail Report of Central Jail, Ambikapur Surguja (C.G.) the appellant has already completed his jail sentence i.e R.I. for 7 years and released from jail on 16/03/2011. Therefore, there is no need to pass any further order.

-Sd/-
(Gautam Chourdiya)
Judge

Chandrakant