

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2148 of 2000****Judgment Reserved on 12/12/2019****Judgment delivered on 06/03/2020**

1. Vinay Kumar S/o Shankarlal, aged about 22 years,
 2. Puhup Bai W/o Shankarlal, aged about 41 years,
- Both cultivators and are R/o Village Bejalpur, Police Station Pandariya, Distt. Kawardha (Judicial Distt. Bilaspur).

--- Appellants**Versus**

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellants	:	Mr. C.R. Sahu, Advocate
For Respondent	:	Mr. Sushil Sahu, PL

Hon'ble Shri Justice Arvind Singh Chandel**CAV Judgment**

1. This appeal is directed against the judgment dated 26/07/2000 passed in Sessions Trial No. 115/1999 by the Additional Sessions Judge, Mungeli, District Bilaspur (C.G.), whereby the Appellants have been convicted under Sections 363, 366 and 366(A) of the Indian Penal Code and sentenced to undergo RI for 1 year with fine of Rs. 500/-, RI for 3 years with fine of Rs. 500/- and RI for 03 years with fine of Rs. 500/-, respectively, with default stipulations. Appellant No. 1 Vinay has been additionally convicted under Section 376 of the IPC and sentenced to undergo RI for 7 years and to pay fine of Rs. 1000/- with default stipulation.

2. Facts of the case are that Appellant No. 2 is mother of Appellant No. 1. As per the case of the prosecution, the age of the Prosecutrix was about 14-15 years at the relevant time. On 27/01/1999 at about 3:00 pm, the Appellants had taken the Prosecutrix with them saying that they are going to market at Chilfi. They were seen by Devmati (PW11) and Ramcharan (PW12). When the Prosecutrix did not return, on 04/02/1999 Hemudas (PW1), father of the Prosecutrix made a written complaint vide Ex.P-1. On the basis of said complaint, offence has been registered. During course of investigation, mark-sheet of the Prosecutrix was recovered from Hemudas (PW1) vide Ex.P-4. According to the mark-sheet entry, the date of birth of the Prosecutrix is 09/11/1984. During course of investigation, on 04/02/1999 the Prosecutrix was recovered from the house of Khilawan (PW6) at village Barbaspur vide recovery memo Ex.P-7. Firstly, the Prosecutrix was medically examined by Dr. M.T. Minj (PW4). Her report is Ex.P-9. On her advice, ossification test was conducted by Dr. S. Chatterjee (PW13) to determine the age of the Prosecutrix. His report is Ex.P-20. According to the report, the age of the Prosecutrix was found about 16 years. Later on, statement of the Prosecutrix as well as other witnesses have been recorded under Section 161 of the Cr.P.C. During course of investigation, Musaphiri register Article-D was seized from Kotwar Kamval Singh (PW10) vide Ex.P-14. After completion of investigation, a charge-sheet was filed. Trial Court framed the charges. As many as 14 prosecution witnesses have been examined. Statement of the Appellants under Section 313 of the Cr.P.C have been recorded, wherein they have pleaded their innocence and false implication in the matter. No defence witness has been examined.

3. After trial, the trial Court has convicted and sentenced the Appellants as mentioned in paragraph one of this judgment. Hence, this appeal.
4. Learned counsel appearing on behalf of the Appellants has submitted that the Trial Court has wrongly convicted the Appellants without there being any evidence available on record. It has been further submitted that the statement of the Prosecutrix as well as other witnesses would show that the Prosecutrix herself had left her house and stayed in the house of Khilawan (PW6) for about 3-4 days with Appellant No. 1. It is also apparent from her statement that she was the consenting party in the alleged act. There is no conclusive evidence available on record on the basis of which it can be said that at the time of the incident, the Prosecutrix was aged below 18 years. Though in the Dakhil Kharij register the date of birth of the Prosecutrix is mentioned as 09/11/1984, Teacher -Namdas (PW3) has admitted the fact that there are various overwriting and corrections in date of births of the students in Dakhil Kharij register. Thus, the entries of Dakhil Kharij register is suspicious. Moreover, it is not established that who made these entries in Dakhil Kharij register and on what basis these entries have been made. Both the Prosecutrix (PW1) and her father Hemudas (PW1) are not able to state the exact date of birth of the Prosecutrix. As per the ossification test report (Ex.P-20), the Prosecutrix has been found aged about 16 years. It is settled legal position that higher side of margin of error of two years is considered in favour of the accused. In these circumstances, the finding of the trial Court is not sustainable. He prayed for acquittal of the Appellants.
5. Learned counsel appearing on behalf of the State opposes the same and

supported the impugned judgment.

6. I have heard learned counsel for the parties and perused the record minutely.
7. With regard to the incident, the Prosecutrix (PW2) has deposed that on the date of incident at about 3:00 pm, Appellant No. 2 came to her house and had taken her to Chilfi Bazar. At that time, Appellant No. 1 was also with them. She further deposed that on the way, Appellant No. 2 boarded them (the Prosecutrix and Appellant No.1) in a bus which was going towards Barbaspur. Thereafter, Appellant No. 1 has taken her to the house of his Uncle namely Khilawan (PW6) at Barbaspur. She further deposed that on being asked by Khilawan (PW6), Appellant No.1 told him that they have performed marriage, however, she told Khilawan (PW6) that Appellant No. 1 has forcibly taken her. She further deposed that she stayed for about 3-4 days in the house of Khilawan with Appellant No. 1 and during this period, Appellant No. 1 has committed sexual intercourse with her. In para 11 of her cross-examination, the Prosecutrix (PW2) has admitted the fact that the bus, in which they were boarding to village Barbaspur, was fully crowded and there was no seat available to sit and after stopping the bus, they had gone to the house of Khilawan at Barbaspur on their foot. She further admitted that in the house of Khilawan (PW6), her wife and daughter were present. She further admitted that she stayed there for about 3-4 days and during this period, she met with many people of village who came to the house of Khilawan. She further admitted that till she stayed in the house of Khilawan she was living well. Though this witness has deposed that she had told Kotwar Kamval Singh (PW10) that Appellant

No. 1 had forcibly brought her, Kotwar Kamval Singh (PW10) has not supported the above statement of the Prosecutrix. Kamval Singh (PW10) has deposed that Khilawan Singh (PW6) had told him that one boy and one girl have come to his house. Then, he went to his house and asked the Prosecutrix and Appellant No. 1 as to why they have come. At that time, Appellant No. 1 told him that the Prosecutrix after fleeing from her house has come with him and due to fear of villagers, they have come to the house of Khilawan. This witness also deposed that the Prosecutrix herself told him that she has come with Appellant No. 1 and she will save him. As stated by Devmati (PW11) and Ramcharan (PW12), they had seen the Prosecutrix going with Appellant No. 2. According to the case of the prosecution also, Brijlal had seen them.

8. After examining the above evidence, it makes clear that the Prosecutrix was the consenting party in the alleged act and she herself had left her house to go with Appellant No. 1 because at the time when she was taken by the Appellants, Devmati (PW11) and Ramcharan (PW12) had seen the Prosecutrix going with the Appellants, but the Prosecutrix never raised any alarm or made any complaint to them. Apart from this, when the Prosecutrix and Appellant No. 1 were going to village Barbaspur in a bus which was fully crowded, at that time also, the Prosecutrix did not raise any alarm or made any complaint. Further, while recording the entries in Musafiri register by Kotwar Kambal Singh (PW10), the Prosecutrix herself told him that she has come with a boy and will save him. This statement of the Prosecutrix itself shows that she had gone with Appellant No. 1 on her own will. Moreover, the Prosecutrix stayed in the house of Khilawan for about 3-4 days and met with many villagers of Barbaspur, but she did not

tell them about the incident or made any complaint to them. Looking to the above conduct of the Prosecutrix, it is well established that she was the consenting party in the alleged act.

9. Now, this case only remains for consideration of the age of the Prosecutrix.
10. In their court statement, the Prosecutrix (PW2) and her father Hemudas (PW1) have deposed that at the time of incident, the Prosecutrix was aged about 14 years. Both these witnesses have admitted that they are unable to state exact date of birth or year of birth of the Prosecutrix. In para 14 of her cross-examination, the Prosecutrix (PW2) has admitted that her friends have already married and are residing at their respective matrimonial house. This admission of the Prosecutrix shows that she was also having the age of marriage. Though in Dakhil Kharij register Ex.P-5-A the date of birth of the Prosecutrix is mentioned as 09/11/1984, Namdas (PW3) from whom the said register was seized has admitted the fact that there are many corrections and overwriting in the date of births of the students. In these circumstances, the date of birth of the Prosecutrix as 09/11/1984 is fatal to believe. Thus, the entries of Dakhil Kharij register is of no use for the prosecution. Apart from this, as per the ossification test report Ex.P-20, the age of the Prosecutrix has been found about 16 years. Benefit of margin of error of two years on either side is given in a case of determination of age based on ossification test. It is settled legal position that higher side of margin of error of two years is considered in favour of the accused. In the instant case, age of the Prosecutrix, based on the ossification test, is 16 years. Thus, considering the higher side of margin of error of two years, the age of the Prosecutrix comes to 18 years. As

already discussed above that the Prosecutrix was the consenting party in the alleged act and in absence of any conclusive evidence indicating that she was below 18 years, the finding of the trial Court in this regard is not in accordance with the evidence available on record. Therefore, the Appellants are entitled to get benefit of doubt.

11. In the result, the appeal is allowed. The judgment of the trial Court is set-aside. The Appellants are acquitted from the charge framed against them. Their bail bonds be released forthwith.
12. Records of the court below along with the copy of this judgment be sent back forthwith for necessary compliance and action.

Sd/-
(Arvind Singh Chandel)
Judge