

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 888 of 2002

- Nageshwar Kushwaha S/o Ram Kishun, age 23 years, Occupation- Agriculture, R/o Village Pendari, P.S. Basantpur, District Surguja (C.G.)

---- Appellant

Versus

- The State of Chhattisgarh, through S.H.O. P.S. Basantpur, District, Surguja (C.G.)

---- Respondent/State

For Appellant	:	Shri A.K. Prasad, Advocate
For Respondent/State	:	Shri Ashish Gupta, Panel Lawyer

Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board

16.01.2020

1. This appeal arises out of the judgment of conviction and order of sentence dated 14.08.2002 passed by the Second Additional Sessions Judge, Ambikapur, District Surguja (C.G.) in Sessions Trial No. 381 of 2000, whereby the Appellant stands convicted and sentence as under:-

<u>Conviction</u>	<u>Sentence</u>
Under Section 376(1) of Indian Penal Code (hereinafter referred to as the 'IPC')	R.I. for three years and pay a fine of Rs.10,000/-, in default of payment to further undergo R.I. for nine months.

2. Facts of the case in brief are that on 19.09.1999 at about 07:00 pm when prosecutrix, aged about 16 years, was at kitchen garden (*Kyari*) in the backside of her home, accused/appellant Nageshwar caught hold of the prosecutrix, threw her on the ground and committed forcible sexual intercourse against her and the accused/appellant promised the prosecutrix that he will marry her. Thereafter, the appellant on the pretext of marrying

with the prosecutrix continued physical relations with the prosecutrix from September, 1999 to March, 2000. Later on, the appellant and his family member were demanding cash of Rs.40,000/- and land situated at Wadrafnagar as dowry for performing the marriage of the appellant with the prosecutrix. The Panchayat was convened to resolve the dispute between the prosecutrix and the appellant regarding their marriage. After the panchayat, the appellant denied for marrying the prosecutrix. Then, the written report Ex.-P/1 was lodged by the prosecutrix on 21.07.2000 at police station Basantpur against the accused/appellant. On the basis of written report (Ex.-P/1), F.I.R. (Ex.-P/2) was registered on the same day against the accused/appellant. During investigation, the investigating officer prepared spot map vide Ex.-P/5; documents of village panchayat meetings and applications submitted by the prosecutrix and the appellant were seized vide Ex.-P/7. The prosecutrix was sent for medical examination to Community Health Centre, Wadrafnagar vide Ex.-P/13A. The prosecutrix (PW-1) was medically examined by PW-10 Dr. Manju Ekka and she gave her report Ex.P/13. As per report (Ex.-P/13), Doctor mentioned that the axillary hair and breast of the prosecutrix were well developed and no sign of any injury was found. Her vagina and pubic hair were well developed and no sign of injury was found on her thigh around the vagina. According to the Doctor, it appears that the sexual intercourse was done with the consent of the prosecutrix.

3. After completion of investigation, charge-sheet was filed by the police on 13.11.2000 for the offence under Section 376 of IPC. However, the trial Court framed the charge against the accused/appellant under Section 376(1) of IPC which was denied by him and he prayed for trial.
4. So as to hold the accused/appellant guilty, prosecution has examined 13 witnesses in support of its case. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the charge

levelled against him and pleaded his innocence and false implication in the case due to village rivalry. No defence witness has been examined on behalf of the appellant.

5. Shri A.K. Prasad, learned counsel appearing on behalf of the appellant submits that as per F.I.R. (Ex.-P/2), the incident happened in the year 1999, but no specific date was mentioned in the F.I.R. which was registered on 21.07.2000 and no proper explanation has been given by the prosecutrix regarding delay in lodging the F.I.R. He further submits that the age of the prosecutrix was not proved by the prosecution and as per evidence of Dr. Manju Ekka (PW-10), the age of the prosecutrix would be 17-18 years at the time of incident. 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 as per the documents of panchayat produced before the trial Court, there is no any allegations against the appellant that he committed rape or forcible sexual intercourse against the prosecutrix. He further submits that the prosecutrix was a consenting party to the act of the accused/appellant as she had physical relations with the accused/appellant for about six months and did not disclose the same to anyone.
6. Shri Ashish Gupta, learned Panel Lawyer appearing on behalf of the State supports the impugned judgment and submits that there is no any reason to disbelieve the evidence of prosecutrix that on the pretext of marry, the accused/appellant committed sexual intercourse with the prosecutrix from September 1999 to March 2000. He also submits that due to fear of her defamation in society, the prosecutrix concealed the facts from her parents and the panchayat members. Therefore, the learned trial Court has rightly convicted and sentenced the accused/appellant for the offence under Section 376(1) of IPC and there is no illegality or infirmity in the same

warranting interference by this Court.

7. Heard learned counsel for the parties and also perused the records of the trial Court.
8. First this Court considers the age of the prosecutrix. There is no any evidence adduced by the prosecution to prove the specific date of birth of the prosecutrix. Article-1 (mark sheet), primary school certificate of the prosecutrix, is not proved by the author, nor any school record, nor kotwari-panji, nor ossification test report produced by the prosecution to prove the actual date of birth of the prosecutrix. The date of birth was mentioned in Article-1 is not duly proved by the author that on which basis the date of birth of the prosecutrix was mentioned in Article-1. Therefore, no any documentary evidence adduced by the prosecution regarding date of birth of the prosecutrix.
9. PW-1 prosecutrix has also not stated her date of birth in her court evidence. PW-2 Nanku and PW-3 Madhu Bai, parents of the prosecutrix, have also not stated about the date of birth of prosecutrix. Looking to the evidence of mother (PW-3) of the prosecutrix, she (PW-3) admitted that her marriage was performed at the age of 15-16 years and after two years of her marriage, her elder daughter aged about 35 years was born and she has seven children. Therefore, looking to the statement of PW-3 (mother of the prosecutrix), it cannot be presumed or proved that the prosecutrix (PW-1) was below the age of 16 years at the time of incident.
10. The incident happened in the year 1999 and at that time the age for consent was 16 years. As per the evidence available on record of Dr. Manju Ekka (PW-10), the prosecutrix was aged about 17-18 years at the time of incident and she was habitual to sexual intercourse. Therefore, the prosecution has utterly failed to prove that the prosecutrix had not attained the age for consent at the time of incident.
11. As per finding of the trial Court in para-19 of its judgment, the trial Court

observed that the prosecutrix was a consenting party and she made sexual relationships with the appellant for about six months. Thereafter, when the appellant denied to marry the prosecutrix, the prosecutrix lodged the report. But, the finding given by the trial Court regarding age of the prosecutrix that she was below 16 years is not sustainable looking to the evidence available on record. Therefore, if the age of the prosecutrix was above 17-18 years at the time of incident in the year 1999, then, as per law prevalent at that time the prosecutrix had attained the age for consent. Prior to Amendment Act of 2013, a man is said to have committed rape if he had sexual intercourse with a woman with or without her consent when she is under 16 years of age.

12.As per Ex.-D/1 to Ex.-D/6, letters written by the prosecutrix (PW-1) to the appellant it is clear that she was having affair with the appellant for long time and the prosecutrix (PW-1) stated in para-28 that the appellant was ready to marry her, therefore, she has not stated before the panchayat regarding the commission of rape by the appellant. She also stated that about 20-25 letters have been written by her to the appellant.

13.PW-7 Jagdev is the secretary of Gram Panchayat of village Pendari and he stated that on 06.05.2000 panchayat was convened. He stated in his deposition in para-2 that the appellant and the prosecutrix both have illicit relations with each other and the appellant was also ready to marry the prosecutrix in the month of October, 2000 in their society rituals, but the prosecutrix wanted to marry with the appellant prior to the month of October, 2000, therefore, the dispute arose between both the families of the appellant and the prosecutrix. Thereafter, the appellant was not present before the panchayat and the panchayat granted permission to the prosecutrix to lodge a report. PW-7 Jagdev, Secretary of Gram Panchayat of village Pendari, also admitted in para-9 that there is no specific allegations made in application i.e. Article-2 before the panchayat regarding forcible sexual intercourse committed by the appellant with the prosecutrix.

- 14.** PW-8 Jhamkal Bai is the village Sarpanch of village Pendari. She stated in para-1 of her deposition that both the appellant and the prosecutrix agreed before the Panchayat to marry and both accepted their illicit relations with each other. She further stated that the appellant said that he will marry the prosecutrix according to their social rituals and thereafter parents of the prosecutrix were quarreling with the appellant. Thereafter, the appellant said that without dowry, he will not marry. Thereafter, when the prosecutrix submitted application to the Panchayat, the appellant did not come in the Panchayat, therefore, decision could not be taken in Panchayat regarding dispute between the appellant and the prosecutrix and the prosecutrix went to the police station to lodge report against the appellant.
- 15.** Looking to the entire evidence available on record, the prosecutrix admitted that approximate 20-25 letters have been written by the prosecutrix to the appellant during the year 1999 to March 2000 and there is no any complaint made by the prosecutrix that the appellant had committed sexual intercourse against her will and in fact, when the appellant has denied to marry the prosecutrix, she made complaint to the police station.
- 16.** In preceding paragraphs, this Court already observed that prosecution utterly failed to prove that on the date of incident, the prosecutrix had not attained the age for consent. As per the evidence of Dr. Manju Ekka (PW-10), the age of the prosecutrix at the relevant time comes to 17-18 years and according to law prevalent at the time of incident, she had attained the age for consent. Thus, considering the facts and circumstances of the case, the evidence of the prosecution witnesses in particular the evidence of prosecutrix (PW-1), Jagdev (PW-7) and Jhamkal Bai (PW-8), the conduct of the prosecutrix during course of incident and subsequent thereto as well as inordinate delay in lodging the report, this Court is of the opinion that the prosecutrix was a consenting party to the act of sexual intercourse committed by the appellant. Being so, the trial Court has not justified in

convicting the appellant under Section 376(1) of IPC.

17.For the foregoing reasons and discussions, the appeal is allowed. The conviction and sentence awarded to the appellant under Section 376(1) of IPC are set aside. The Appellant is acquitted of the said charge framed against him. If fine amount has been deposited by the appellant, the same be refunded to him.

18.It is also stated that the accused/Appellant is on bail since 03.09.2002, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437-A of Cr.P.C.

Sd/-

(Gautam Chourdiya)
Judge