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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1136 of 2002

Judgment Reserved on : 6.3.2020

Judgment Delivered on : 18.6.2020

Harinarayan, son of Dayaram Rajwade, age 30 years, resident of Village Kumda Basti, P.S. Bishrampur, District Surguja, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh through P.S. Bishrampur, District Surguja, Chhattisgarh

--- Respondent

and

Criminal Appeal No.1247 of 2002

Jagbaran, son of Premsay, age 27 years, resident of Village Kumda Basti, P.S. Bishrampur, District Surguja, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh through P.S. Bishrampur, District Surguja, Chhattisgarh

--- Respondent

For Appellants	:	Shri N.S. Dhurandhar, Shri A.K. Prasad, Shri Suresh Tandan and Shri Praveen Dhurandhar, Advocates
For Respondent	:	Shri Susheel Sahu, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. Since both the appeals arise out of a common judgment, they are decided together.
2. The appeals have been preferred against the judgment dated 22.10.2002 passed by the Additional Sessions Judge, Surajpur,

District Surguja in Sessions Trial No.92 of 2002, whereby both the Appellants have been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.500/- with default stipulation
Under Section 376(2)(g) of the Indian Penal Code	Rigorous Imprisonment for 10 years and fine of Rs.1,000/- with default stipulation

3. Prosecution case, in brief, is that on the relevant date, age of the prosecutrix (PW1) was about 15 years. At that time, she was studying in 6th standard. On 3.12.2001, after attending her school in the evening hours, she was returning her house. On the way, both the Appellants met with her and they deliberately made her sit on their motorcycle and took her to the house of Jagsai, brother of Appellant Jagbaran, where both the Appellants committed forcible sexual intercourse with her one by one in the night. Next day, the Appellants took her to the house of one other person. There they kept her for 2 days and there also they committed sexual intercourse with her. Next day, in the afternoon, *jija* (brother-in-law) of Appellant Jagbaran left her near the house of her sister Manmet (PW3). The prosecutrix told about the incident to Manmet (PW3). Next day, Niranjya (PW2), mother of the prosecutrix was called. Thereafter, Niranjya (PW2) took the prosecutrix with her. Thereafter, First Information Report (Ex.P1) was lodged by the prosecutrix. Statements of the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet

was filed against the Appellants. Charges were framed against them.

4. In support of its case, the prosecution examined as many as 11 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellants denied the guilt and pleaded innocence. No witness has been examined in defence.
5. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellants as mentioned in second paragraph of this judgment. Hence, these appeals.
6. Learned Counsel appearing for the Appellants submitted that without there being any evidence on record against the Appellants, the Trial Court has wrongly convicted them. It was further submitted that from the admissions made by the prosecutrix and from the statements of Niranjiya (PW2), mother of the prosecutrix and Prem Sai (PW7), father of the prosecutrix, it is well established that at the time of incident, the prosecutrix was more than 18 years of age. Though according to the entries of dakhil-kharij register (Ex.P4), the date of birth of the prosecutrix is 1-8-1987, but those entries were recorded at whose instance and on what basis have not been disclosed by Headmaster Deonarayan Jaiswal (PW6). He has admitted that in their school, admission of the prosecutrix was done in July, 2001 and they had entered her date of birth in their school record on the basis of the primary school examination certificate. He has admitted the fact that on what basis the entries were made in the primary school was not known to him. Mother and father of the prosecutrix have also not stated anything about who had got the prosecutrix admitted in the primary school. Both mother and father of the prosecutrix have not been able to state

date of birth of the prosecutrix and as per their statements, it seems that age of the prosecutrix was more than 18 years. Thus, finding of the Trial Court with regard to age of the prosecutrix is contrary to the evidence available on record. It was further submitted that from the statement and conduct of the prosecutrix, it is also established that she herself went to Appellant Jagbaran and stayed with him for about 3 days. She had ample opportunity to come out of his clutches and disclose the matter, but she did not do so. Thus, it seems that the prosecutrix was a consenting party. With regard to Appellant Harinarayan, it was submitted that Appellant Harinarayan has been falsely implicated in the case due to a family dispute with the family members of the prosecutrix. It was submitted that if the entire evidence is taken as it is, it seems that the prosecutrix left her house at her own will due to love relationship with Appellant Jagbaran and the alleged act of sexual intercourse was committed only by Appellant Jagbaran. Since the prosecutrix was a major girl and was a consenting party, no offence is proved against Appellant Jagbaran also. It was further submitted that according to the case of the prosecution, on 3.12.2001, the prosecutrix had gone away along with the Appellants while returning from her school. But, Headmaster Deonarayan Jaiswal (PW6) has categorically admitted that on 3.12.2001, the school was closed due to holiday. Thus, the entire prosecution story seems to be doubtful. It was further submitted that the First Information Report (Ex.P1) was lodged on 8.12.2001, i.e., after 3 days of return of the prosecutrix, but the delay has also not been duly explained by the prosecutrix. Therefore, this goes against the prosecution.

7. Learned Counsel appearing for the State/Respondent opposed the

arguments advanced on behalf of the Appellants and supported the impugned judgment of conviction and sentence.

8. I have heard Learned Counsel appearing for the parties and perused the record with due care.
9. I shall first discuss about age of the prosecutrix. According to the case of the prosecution, on the relevant date, the prosecutrix was below 16 years of age. There is one document regarding age of the prosecutrix, i.e., entries of dakhil-kharij register (Ex.P4) which shows that the date of birth of the prosecutrix is 1.8.1987. Entries were made by Deonarayan Jaiswal (PW6), Headmaster of Government Middle School, Kumda Basti, Bishrampur. According to the statement of Headmaster Deonarayan Jaiswal (PW6), the prosecutrix was admitted in their school in July, 2001 in 6th standard. They had recorded date of birth of the prosecutrix on the basis of primary school examination certificate of the prosecutrix. This witness has admitted that he was not aware whether the entry of date of birth of the prosecutrix in the primary school examination certificate was correct or not. Initially, in the primary school, who got the prosecutrix admitted and on what basis her date of birth was recorded there, no evidence in this regard has been led by the prosecution. According to the statement of Headmaster Deonarayan Jaiswal (PW6), the prosecutrix was admitted in their school in July, 2001 in 6th standard. The prosecutrix (PW1) has deposed that she had studied from Class 1 to 6 in the school situated at Kumda. She has further admitted that in class 5, she had studied for 3 years. Thereafter, there was a gap of 2 years and thereafter she was got admitted in 6th standard. Meaning thereby, before her admission in 6th standard in the year 2001,

there was a lapse of 5 years in continuation of her studies. If it is presumed that she was admitted in 1st standard at her age of 6 years then considering the lapse of 5 years and her admission in 6th standard in the year 2001, her age comes to nearby 17 years. The prosecutrix (PW1) and her parents Niranjiya (PW2) and Prem Sai (PW7) have not stated anything regarding actual date of birth of the prosecutrix. In her cross-examination, the prosecutrix has admitted the fact that they are 6 sisters and 1 brother and she is the youngest sister among the 6 sisters. She has further admitted that all the sisters and brother have got married and immediate elder to her is her brother Parbal, who is also married and he has 2 children. Niranjiya (PW2), mother of the prosecutrix has also deposed that immediate elder sister of the prosecutrix is married and she has 4 children and that immediate elder sister is aged about 34 years. Prem Sai (PW7), father of the prosecutrix has also admitted that his eldest daughter is about 45-50 years of age. Apart from the above, there is no evidence on record regarding age of the prosecutrix. From perusal of the evidence available on record, I find that the prosecution has totally failed to prove the fact that on the relevant date the prosecutrix was below 18 years of age. Thus, finding of the Trial Court in this regard is contrary to the evidence available on record.

10. I shall now discuss conduct of the prosecutrix and other evidence led by the prosecution. In her Court statement, the prosecutrix (PW1) has deposed that on the date of incident at about 4 p.m. when she was returning from her school, the Appellants came to her near the school itself and they made her sit on their motorcycle. When she tried to shout, they gagged her mouth. Thereafter, they took her to the house of Jagsai, brother of

Appellant Jagbaran. There, both the Appellants forcibly committed sexual intercourse with her in the night. She has further deposed that next day in the morning at 5 a.m., Appellant Jagbaran took her to the house of one other person where he kept her for 2 days and there also he (Appellant Jagbaran) committed sexual intercourse with her. Thereafter, next day, the Appellants left her on the way near the house of her sister. Thereafter, she told about the incident to her sister and brother-in-law. Her brother-in-law left her thereafter at the house of her mother. During cross-examination, contradicting the above, she has stated that her brother-in-law called her mother and her mother took her to her house. The prosecutrix has further deposed that 6 days thereafter she lodged the First Information Report (Ex.P1). Regarding delay in lodging the FIR, she has explained that the delay occurred because her parents were searching for her and, therefore, she lodged the FIR after 6 days of the incident. During cross-examination, she has admitted that Appellant Jagbaran was driver of the jeep of her father. She has also admitted that Appellant Harinarayan is married and he has children also. She has further admitted that when she was taken to the house of Jagsai, she did not disclose him anything. In paragraphs 8 and 9 of her cross-examination, she has further deposed that next day, when Appellant Jagbaran took her from the house of Jagsai to the house of other person, in that house, family members of that person were also residing. She was also being served food in the house of that other person by his family members. She was also taking bath there and she was also washing her clothes and spreading them at that house for drying. During the day hours, Appellant Jagbaran was going out and she was spending time with children of that other person. She has

further admitted in paragraph 11 that the police had recorded the FIR as was told by her mother and brother-in-law. In paragraph 14 also, she has further deposed that when after the incident she reached at the house of her sister, at that time, she did not tell anything about the incident to her sister and when her sister asked her after 1-2 hours then also she did not disclose anything to her. She has further admitted that when she reached her home, her parents had committed *marpeet* with her.

11. Niranjiya (PW2), mother of the prosecutrix has deposed that the prosecutrix had gone away somewhere and she returned after 3-4 days to the house of her son-in-law. She has further stated that she went to the house of her son-in-law where the prosecutrix did not tell her anything, but her elder daughter Manmet (PW3) told her that Appellant Jagbaran had taken the prosecutrix away with him. According to Niranjiya (PW2), Manmet (PW3) had not told her anything about any other person other than Appellant Jagbaran.
12. Manmet (PW3) has deposed that in the evening hours, the prosecutrix had come to her house. On being asked, she told her that Appellant Jagbaran had left her there and he had also committed wrong act with her.
13. Jawahar (PW4), brother-in-law of the prosecutrix has deposed that in the evening hours, he had returned home. In the night, his wife Manmet (PW3) told him that the prosecutrix was left at his house by the Appellants. During cross-examination, he has admitted that the prosecutrix herself had not told him anything.
14. Premesai (PW7), father of the prosecutrix has deposed that the prosecutrix was not present at home for 3-4 days. Thereafter,

Manmet (PW3) came to his house and told that the prosecutrix was present at their house. According to Prem Sai (PW7), then his wife went to the house of Manmet (PW3), but after return, his wife did not tell him anything other than that the prosecutrix has been found and they have made a report in the police station. During cross-examination, this witness has admitted that earlier also, the prosecutrix had run away from home many times.

15. On a minute examination of the statements of the above witnesses, it is clear that Appellant Jagbarán was driver of the jeep of father of the prosecutrix. As per the Court statement of the prosecutrix, both the Appellants had taken her to the house of Jagsai. Thereafter, Appellant Jagbarán had taken the prosecutrix to the house of some other person and had kept her there for 2 days. At the house of Jagsai, his family members were also residing. In their presence, both the Appellants committed gang rape with the prosecutrix is suspicious. Whatever incident took place with the prosecutrix after leaving the house of Jagsai, the prosecutrix has not stated anything about involvement of Appellant Harinarayan. From the statement of the prosecutrix, it is also established that Appellant Jagbarán had taken her from the house of Jagsai to the house of some unknown person and had kept her there for 2 days and Appellant Jagbarán was also accompanying with her. At the house of that unknown person, family members of that person were also living. The prosecutrix was taking meals at that house, she was taking bath also there and was also washing her clothes and spreading them there for drying. There she was also spending time with the children of that person in absence of Appellant Jagbarán. Thus, the prosecutrix had ample opportunity to disclose about the incident to the family members of that person

or to run out of that house, but she did not do so. From the admission made by the prosecutrix, it is also established that even after going to the house of her sister Manmet (PW3), she did not disclose her anything about the incident. From the statements of Niranjya (PW2) and Prem Sai (PW7), mother and father of the prosecutrix, respectively, it is also established that the prosecutrix herself did not tell them anything about the incident. From the statement of Prem Sai (PW7), it is established that earlier also, the prosecutrix had run away from home many times. According to the case of the prosecution, the alleged incident started taking place on 3.12.2001 when the Appellants had taken the prosecutrix away while her returning from her school. But, from the statement of Headmaster Deonarayan Jaiswal (PW6), the school was closed on 3.12.2001 due to holiday. This creates a doubt whether the incident took place on 3.12.2001 or not. Even if for the sake of argument it is considered that the prosecutrix had returned on 5.12.2001, i.e., after 3 days of the alleged incident, the FIR (Ex.P1) was lodged on 8.12.2001. There is no reasonable explanation available on record regarding the delay in lodging the FIR. According to the case of the prosecution, the prosecutrix was missing from home for 3-4 days, but no missing report was lodged by her parents. From the admission made by Prem Sai (PW7), father of the prosecutrix, it is established that earlier also, the prosecutrix had run away from home many times. From perusal of the evidence available on record, the entire story narrated by the prosecution seems to be suspicious. Even if the statement of the prosecutrix is taken as it is, the whole case of the prosecution against Appellant Harinarayan is totally doubtful. With regard to Appellant Jagbaran, it seems that even if any such alleged incident

had taken place with the prosecutrix, she was a consenting party. Since the prosecution has not been able to establish that on the relevant date the prosecutrix was below 18 years of age, no case is made out against Appellant Jagbaran also. Thus, the finding of the Trial Court is not sustainable.

16. Consequently, both the appeals are allowed. The impugned judgment of conviction and sentence is set aside. The Appellants are acquitted of the charges framed against them.
17. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-
(Arvind Singh Chandel)
JUDGE