

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1091 of 2007**Judgment reserved on 01.09.2020Judgment pronounced on 26.11.2020

Narhari Sahu, S/o. Benu Ram Sahu, aged about 22 years,
Occupation Agriculturer R/o. Village Sauga, P.S. Magarlod, District
Dhamtari, Chhattisgarh

---Appellant**Versus**

State of Chhattisgarh, Through – P.S. Magarlod, District – Dhamtari,
Chhattisgarh

---Respondent

For Appellant : Mr. D.N. Prajapati, Advocate

For Respondent : Mr. Sameer Sharma, Dy. GA

Hon'ble Smt. Justice Vimla Singh Kapoor**CAV Judgment**

FIR (Ex-P-4) lodged by Firanta (PW-2) – the grandfather of the prosecutrix discloses that on 09.09.2005, the accused-appellant removed the prosecutrix from her lawful guardianship took her to various places and kept her with him for number of days. FIR also discloses the date of birth of prosecutrix to be 18.04.1989 and, as such, she has been branded as minor on the date of incident. On the basis of FIR offences under Sections 363 and 366 IPC were registered against the accused-appellant. After the prosecutrix got back, she was sent for medical examination, her statement under Section 161 Cr.P.C. also recorded and after completion of investigation charge-sheet was filed against the accused-appellant

under Sections 363, 366, 506-B and 376 IPC, and so also the charge was framed under the same sections.

2. Learned Court below vide judgment impugned dated 01.12.2007 passed in Sessions Trial No.72/2006 acquitted the accused-appellant of the charges under Sections 506-B and 376 IPC but held him guilty under Sections 363 and 366 IPC by imposing the sentence of R.I. for three years on each count. Hence this appeal.

3. Counsel for the accused-appellant submits that the prosecution has utterly failed to prove that the prosecutrix was below 18 years of age on the date of incident, but yet the accused-appellant has been convicted under Section 363 of IPC. He submits that learned Court below has ignored the fact that the prosecutrix herself has declared hostile and have not supported the case of the prosecution, but yet the accused-appellant has held guilty under Sections 363 and 366 IPC. According to the counsel for the accused-appellant, when the accused-appellant has been acquitted of other charges, he should have been given the same treatment for other charges also, because no other evidence has been collected by the prosecution, on the basis of which, the Court below might have been persuaded to held him guilty under Sections 363 and 366 IPC. He submits that the grandfather of the prosecutrix Firanta (PW-2) and father – Chandu (PW-1) though have tried to support the case of the prosecution to the effect that the prosecutrix was minor on the date of incident, they have not proved the origin of the date of birth recorded in the school certificates to be 18.04.1989, and, therefore, their statement to this effect becomes redundant. As record says that the prosecutrix herself

has stated that she was above 18 years of age on the date of incident and so also the discloser was made by her before the Court at the time of her examination, where she has told her age to be 20 years.

4. On the other hand, State counsel supported the judgment impugned and submits that as the accused-appellant removed the minor prosecutrix from lawful guardianship and subjected her to sexual exploitation for days together, the findings recorded by the Court below are fully justified and cannot be deprived by this Court.

5. Heard learned counsel for the parties and perused the evidence on record including the judgment impugned.

6. First of all it appears to be just and proper to this Court to decide as to whether the prosecutrix was minor on the date of incident or not. Though her father – Chandu (PW-1) and grandfather – Firanta (PW-2) have stated that on the date of incident the prosecutrix was below 16 years of age, yet though they have not been in a position to explain as to on what basis such assessment has been given by them. What creates down in mind of this Court is that the date of birth as has been disclosed by PW-2 at the time of lodgment of FIR (Ex-P/4) comes to 18.04.1989, but while stating before the Court he has taken a complete somersault and has stated that the date of birth of the prosecutrix was 04.06.1989. however, he has not been in a position as to on what basis he has given these two different date of birth. On the contrary, he has stated that he had not accompanied the prosecutrix nor getting her admitted in the school. If

the evidence of the prosecutrix is taken into consideration, she has categorically stated that she was above 18 years of age at the time of incident. Not only this, she has also given her age before the Court below at the time of deposition to be 20 years. Onkar Sahu (PW-5) – the head master of the school, who has been examined by the Court below to prove the date of birth of the prosecutrix on the basis of school register, has given a yet newer date of birth to be 03.03.1989, but the name of the prosecutrix has been displayed as Kumari Lata, whereas in the FIR it is Somlata. Even this witness has expressed his inability to state as to on what basis the date of birth of the prosecutrix has been mentioned in the school register as 03.03.1989. Thus, there is no concrete evidence to show that at the time of incident the prosecutrix was below 18 years of age. On the contrary, the evidence of prosecutrix right from the beginning makes a clear disclosure that on the date of incident she was above 18 years of age, thus the finding recorded by the Court below that the accused-appellant removed the minor prosecutrix from her lawful guardianship is without any substance and the same is hereby set aside.

7. As regards conviction of the accused-appellant under Section 366 IPC, the prosecutrix right from the stage of her 161 Cr.P.C. statement, she has consistently stated that as the accused-appellant and she herself of the like of each other and she had moved her house without informing about the same to any one in the family, she has clarified that after she accompanied the accused-appellant he did not do anything with her, on this point she has declared hostile. However, in the cross examination also she has consistently stated

that she had clearly informed the police that she had accompanied the accused-appellant out of her own sweet will as he had proposed her for marriage. She has stated that she stayed with him at various places such as Raipur, Nagpur etc. and during this period they both work as labourers in brick-kiln. She has denied that the accused-appellant had allured or enticed her in any manner, what so ever while taking her with him. She has again reiterated in her cross-examination that the accused-appellant had not taken her away against her wishes and that after putting her in threat he has subjected her to forcible sexual intercourse on many occasions. She has further denied that at the time when she accompanied with the accused-appellant, her age was 16 years. She has stated that her father know well in advance that there was love affair between the accused-appellant and her daughter, and as a proposal of marriage was came from her community, a false report was lodged against the accused-appellant. She has further stated that during their stay for number of days at various places they got married and out of their wedlock, they were also having a female issue and are living happy married life. She has further stated that she was told by her grandfather to be 18 years of age at the relevant time. Likewise, she has stated to the police in the like manner. Stating further, she has put forth there blatantly that she was not related with her family in any manner what so ever and the accused-appellant was her own soul. Thus, if the evidence of the prosecutrix is summarized it comes to the four in an unequivocal terms that she accompanied the accused-appellant on her own sweet will and during the stay for days together

number of places they lived as husband and wife after entering into marriage and out of their wedlock they have a female issue with them. One of the requirements to be established in holding the accused-appellant guilty under Section 366 IPC is that the prosecutrix has to be kidnapped or abducted or being compelled to marry as the evidence of the prosecutrix clearly shows that she accompanied the accused-appellant out of her own volition. The offence under Section 366 IPC are not attracted in the case in hand. Since, it has been established that on the date of incident the prosecutrix was above 18 years of age and secondly whatever she did in accompanying the accused-appellant or that so all on her sweet good will, the evidence and other witness including the medical evidence is not required to be dealt with an unnecessary detail. The medical evidence is also in not that much of significance on count of acquittal of the accused-appellant under Section 376 IPC but yet the age of the prosecutrix opined by Dr. Sharda Thakur (PW-4) come to 18 years. Investigating Officer has however supported that case of the prosecution.

8. Thus, in view of the aforesaid factual discussion, where the prosecutrix herself has been declared hostile, this Court is of the opinion that the Court below has not considered the facts collected by the prosecution in proper perspective and has written an erroneous findings holding the accused-appellant under Sections 363 and 366 IPC. The findings recorded by the Court below are not inconsonance collected by the prosecution being so the conviction of the accused-appellant under Section 363 and 366 IPC cannot be

made to sustained the same and is hereby set aside. Accordingly, the appeal is hereby allowed, judgment impugned is hereby set aside in toto. The accused-appellant is acquitted of all the charges leveled against him. Being already on bail no order to set him free etc. is necessary.

Sd/-
(Vimla Singh Kapoor)
Judge