

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 26/08/2020****Judgment delivered on : 18/09/2020****CRA No. 602 of 2014**

- Bhikham Diwan, S/o Vijay Kumar Diwan, Aged About 22 Years
R/o Vill. Rengadih, P.S. Magarlod, Distt. Dhamtari C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through District Magistrate, Dhamtari,
C.G.

---- Respondent

For Appellant	:	Shri DK Gwalre, Advocate on behalf of Shri Pritam Tiwari, Advocate.
For Respondent/State	:	Shri Sameer Sharma, Dy. G.A.

Hon'ble Shri Gautam Chourdiya, J**C A V Judgment**

1. The appeal was heard through video conferencing.
2. Challenge in this appeal under Section 374(2) of CrPC is to the judgment of conviction and order of sentence dated 22.5.2014 passed by the Additional Sessions Judge (FTC), Dhamtari in Special Criminal Case No.03/2014 whereby the appellant stands convicted and sentenced as under:

Conviction	Sentence
Section 4 of Protection of Children from Sexual Offences Act, 2012.	R.I. for 7 year, pay a fine of Rs.4,000/-, in default thereof to undergo additional R.I. for 6 months.

Section 363 of Indian Penal Code.	R.I. for 3 years, pay a fine of Rs.1,000/-, in default thereof to undergo additional R.I. for 2 months.
Section 366 of Indian Penal Code.	R.I. for 5 years, pay a fine of Rs.500/-, in default thereof to undergo additional R.I. for 1 month.

3. Case of the prosecution in brief is that the prosecutrix made a written complaint on 14.12.2013 to Police Station – Arjuni to the effect that in the month of April, 2013 she went to Village-Semra in connection with marriage of her friend Chuneshwari Kanwar and that the appellant Bhikham Diwan (Kanwar) had also come there from Village-Parsabuda. The appellant introduced himself to her as a teacher in Govt. Primary School, Kumhari, Durg and after getting acquainted with her, he gifted her a mobile phone bearing No.8103373843 and requested her to talk. The appellant used to talk with her over mobile and say that he wants to marry her. In the month of May, 2013 she was called by the appellant to Dhamtari on which she went on bicycle at Sihava Chowk, Dhamtari and the appellant came on motorcycle. Thereafter, she alongwith the appellant went to Rudri Bairaj on motorcycle and after some time she returned to her home. After 2-3 days, she went to Gangrel dam with the appellant where the appellant again proposed her for marriage and thereafter, he dropped her at her village in the evening. Again on 8.5.2013 the appellant called her on mobile in the morning on which she informed him that she is not feeling well and would go to District Hospital, Dhamtari for treatment. Then the appellant asked her to meet

him at Sihava Chowk where she went by bicycle. At about 10.30 am the appellant reached there on motorcycle with his friend Kirtan. The appellant told her to go to District Hospital for treatment. After getting medical treatment, on being asked by the appellant, she along with the appellant and his friend proceeded towards Gangrel by motorcycle. However, instead of going to Gangrel, the appellant took her to Rigrishi Ashram, Sihava and sent away his friend Kirtan to some other place. Thereafter, the appellant took her to an isolated place, told her to be in love with her and wanted to marry her. On such persuasions, the appellant removed her clothes and did sexual intercourse with her. After that she returned to her home by bicycle but did not narrate the incident to anyone. When she was carrying pregnancy of about three months, she informed about the same to the appellant on which the appellant told that she need not worry and he would marry her. After about 6-7 months when she again talked with the appellant on mobile, he called her on 12.12.2013 at Ghadi Chowk, Raipur. When she met the appellant there, he refused to marry her and asked her to go to her parents' house and live there after getting $\frac{1}{2}$ acre of land. Thereafter, she returned to her home and informed about the entire incident to her parents, on which her father informed about the same to the villagers on 14.12.2013.

4. On the basis of aforesaid written report (Ex.P/1), FIR (Ex.P/2) was registered against the appellant on 14.12.2013 at 16:25 hours for the offence under Sections 363, 366, 376 of IPC and Sections 3 & 4 of Protection of Children from Sexual Offences

Act, 2012 (in short “the Act, 2012”).

5. During investigation, Date of Birth Halafnama Register (Ex.P/5C) and Dakhil-Kharij Register (Ex.P/6C) of Govt. Primary School, Baliyara were seized vide seizure memo Ex.P/4. Dakhil-Kharij Certificate of the prosecutrix of the said school was also seized vide Ex.P/7. All these documents record her age as 21.9.1997. The appellant was medically examined on 16.12.2013 by Dr.U.L. Koushik (PW-6) and he was found capable of performing sexual intercourse vide Ex.P/8. The accused/appellant was arrested on 16.12.2013 at 18:45 hours vide arrest memo Ex.P/12.
6. Semen slide of the prosecutrix was seized vide Ex.P/9. From possession of the appellant, one Hero Honda Passion Pro motorcycle was seized vide Ex.P/10. The prosecutrix was medically examined by PW-9 Dr. Smt. Madhuri Wankhede on 15.12.2013 vide Ex.P/14. The doctor opined that the prosecutrix is habituated to sexual intercourse, no definite opinion could be given regarding recent intercourse and that she was having pregnancy of about 6 ½ – 7 months (26-28 weeks). However, as per FSL report (Ex.P/20), no human spermatozoa was found on the vaginal slides of the prosecutrix.
7. After recording statements of the witnesses and completing the formalities of investigation, charge sheet under Sections 363, 366, 376 of IPC and Sections 3 & 4 of the Act, 2012 was filed against the appellant. The trial Court framed charges under Sections 363 & 366 of IPC and Section 4 of the Act, 2012 against the appellant, which were abjured by him and he prayed

for trial.

8. So as to hold the accused/appellant guilty, the prosecution examined 09 witnesses in all. 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. However, no witness in defence was examined by the accused/appellant.
9. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in para 2 of this judgment.
10. Learned counsel for the appellant submits that age of the prosecutrix has not been proved to be below 16 years on the date of incident by the prosecution by adducing cogent and reliable evidence. Even the father of the prosecutrix PW-3 Krishna Kumar Jangde has not specifically stated about the age of the prosecutrix and his other children. Therefore, merely on the basis of documents of Ex.P/5C, P/6C and P/7, the trial Court was not justified in holding that the date of birth of the prosecutrix is 21.9.1997 because the father of the prosecutrix was unable to explain the source of actual date of birth. Reliance has been placed on the decision of the Hon'ble Supreme Court in the matter of ***Alamelu and another Vs. State*** (and other connected appeals), **(2011) 2 SCC 385**.
11. He submits that the prosecutrix did not inform about the alleged incident for about 7 months to anyone. There is inordinate and

unexplained delay of about 7 months in lodging the FIR which makes the whole prosecution case doubtful. He further submits that the prosecutrix had once informed the appellant about having relation with one Harish Kumar, on which the appellant stopped talking to her and it appears that since the appellant was a teacher, he has been falsely implicated in this case. He also submits that the FSL report (Ex.P/20) is of no help to the prosecution because no human spermatozoa was found on the vaginal slides of the prosecutrix.

12. Learned counsel for the appellant has specifically contended that as per spot map Ex.P/19, it is clear that the place where the incident occurred, is a busy public place where many persons including coconut sellers remain present and in such circumstances, it was almost impossible for the appellant to commit such an act with the prosecutrix. Furthermore, the prosecution has not examined Kirtan, who was said to be accompanying the prosecutrix and the appellant at the time of incident. This person could have been a best witness and non-examination of this person is a serious lacuna in the case of the prosecution. The evidence of the prosecutrix suffers from material contradictions and exaggerations and also does not get corroboration from any other evidence. Hence the conviction of appellant recorded by the trial court is not sustainable. The appellant deserves to be acquitted of all the charges. Reliance has been placed on the decision in the matter of ***Krishan Kumar Malik Vs. State of Haryana, (2011) 7 SCC 130.***

13. On the other hand, learned counsel for the State supporting the

impugned judgment submits that as per oral and documentary evidence in the form of Ex.P/5C, P/6C and P/7 it is clear that the prosecutrix was below 16 years of age on the date of incident. As per medical report (Ex.P/14) of the prosecutrix and evidence of PW-9 Dr. Smt. Madhuri Wankhede, the prosecutrix was carrying pregnancy of 26-28 weeks at the time of her examination which was conducted on 15.12.2013. In view of the fact that the incident is said to have taken place on 8.5.2013 and as per medical evidence, the prosecutrix was carrying pregnancy of 26-28 weeks on 15.12.2013, the evidence of the prosecutrix appears to be trustworthy and needs no corroboration from the independent witness.

14. As regards delay in lodging FIR, learned counsel for the State submits that the prosecutrix has herself stated that as the appellant had assured her of marriage, she did not disclose about the incident to anyone and it is only on his refusal to marry her, she narrated the entire incident to her parents and then lodged report. Therefore, the explanation given by her for lodging report belatedly appears to be reasonable and satisfactory.

15. Learned counsel for the State submits that no evidence whatsoever was adduced by the accused or any other witness to prove that the prosecutrix was having illicit relation with any other person. No enmity between the prosecutrix and the appellant or their family members has been proved by the defence. The appellant was residing in Magarload, Distt. Dhamtari whereas the prosecutrix was residing at Baliyara. Section 29 of the Act,

2012 deals with presumption as to certain offences under this Act unless the contrary is proved. In view of the above provisions and there being no evidence in rebuttal of the said presumption, the trial Court was fully justified in convicting and sentencing the appellant by the impugned judgment, which calls for no interference by this Court.

16. Heard learned counsel for the respective parties and perused the material available on record.

17. First this Court proceeds to consider the age of the prosecutrix. When the prosecutrix was admitted in Class-1 on 10.4.2003 in Govt. Primary School, Baliyara, her date of birth was mentioned by her father as 21.9.1997 and after passing Class-5 exam, she left the school. The above fact is mentioned in Dakhil-Kharij Register (Ex.P/6C) which has been duly proved by PW-4 Vinod Kumar Sahu, Teacher (Panchayat) of the said school. This witness has also proved the date of birth of the prosecutrix as 21.9.1997 as recorded in the Date of Birth Halafnama Register (Ex.P/5C). The above declaration regarding date of birth was given by father of the prosecutrix PW-3 Krishna Kumar and the said register also bears his signature. PW-3 has proved his signature on the said document. This apart, Dakhil-Kharij Certificate was issued by the Headmaster of the said school in favour of the prosecutrix on 16.12.2013 in which also her date of birth is mentioned as 21.9.1997.

18. Section 35 of the Evidence Act reads as under:

“35. Relevancy of entry in public record or an

electronic record made in performance of duty – An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.

19. Thus, if the documents of Ex.P/5C, P/6C and P/7 are examined in light of the above provisions of Section 35 of the Evidence Act, it is clear that the said documents were prepared by the public officer of Govt. Primary School, Baliyara where the prosecutrix was studying, in discharge of official duty and the entry made therein was in due course of its business by a public officer. The said entry has been duly proved by PW-4 Vinod Kumar Sahu, Teacher (Panchayat) of the said school. The entry regarding date of birth of the prosecutrix as 21.9.1997 has also been proved by her father PW-3 Krishna Kumar Jangde at whose instance the same was recorded. PW-3 admits his signature on the document Ex.P/5C from A to A portion. There is no reason to disbelieve the evidence of PW-3 and PW-4. Therefore, as per Section 35 of the Evidence Act, the entry regarding date of birth mentioned in the above documents is a relevant fact.

20. Learned counsel for the appellant vehemently contended that only date of birth of the prosecutrix was mentioned by her father in his deposition and he further stated that his date of birth is 7th

June, 1972. No other date was mentioned or explained by him because as per his own admission, he did not remember any date and therefore, the entry made in the documents of Ex.P/5C and P/6C at his instance becomes doubtful.

21. The above argument advanced on behalf of learned counsel for the appellant has no substance for the reason that when the prosecutrix was admitted in Class-1 on 10th April, 2003, there was no reason or occasion for her father to record her incorrect or false date of birth. Her father also put his signature on the document of Ex.P/5C in the school and proved the same in the Court. Therefore, this document appears to be the most relevant document regarding date of birth of the prosecutrix and there is no reason to disbelieve it. [Reliance placed on the decision in the matter of ***Murugan Vs. State of Tamil Nadu, (2011) 6 SCC 111***]
22. In the matter of **Alamelu and another** (*supra*) relied upon by learned counsel for the appellant, the age of the prosecutrix was decided by the High Court on the basis of transfer certificate (Ex.P/16) issued by the Headmaster whereas the medical evidence shows her age to be between 17 and 18 years. In the said case, the transfer certificate of the school was not duly proved by the prosecution. In these circumstances, the Hon'ble Apex Court did not hold the prosecutrix to be a minor.

However, in the present case, as observed in the preceding paragraphs, when the prosecutrix was admitted in Class-1 on 10.4.2003 in Govt. Primary School, Baliyara, her date of birth was mentioned by her father as 21.9.1997. The above

fact is mentioned in Dakhil-Kharij Register (Ex.P/6C) which has been duly proved by PW-4 Vinod Kumar Sahu and he has also proved her date of birth as 21.9.1997 as per Date of Birth Halafnama Register (Ex.P/5C). This register bears signature of father of the prosecutrix PW-3 Krishna Kumar and he has proved his signature on the said document. This apart, Dakhil-Kharij Certificate was issued by the Headmaster of the said school in favour of the prosecutrix which also records her date of birth as 21.9.1997. Even otherwise, when the prosecutrix was admitted in Class-1 on 10th April, 2003, there was no reason or occasion for her father to record her incorrect or false date of birth. Therefore, in view of provisions of Section 35 of the Evidence Act, the above documents recording her date of birth as 21.9.1997 appear to be relevant and reliable documents. The trial Court in its judgment from paras 6 to 9 has elaborately discussed regarding date of birth of the prosecutrix in light of the evidence available on record. This Court is also of the opinion that the findings given by the trial Court regarding date of birth of the prosecutrix as 21.9.1997 are based on proper appreciation of the entire evidence available on record. Therefore, this Court has no hesitation in holding that on the date of incident i.e. 8.5.2013 the prosecutrix was below 16 years of age. The judgment relied upon by learned counsel for the appellant being distinguishable on facts is of no help to him.

23. For the purpose of offence under Section 376 of IPC and Sections 3 & 4 of the Act, 2012, the age of consent is above 18 years after the amendment. As per the definition of child given

under Section 2 (d) of the Act of 2012, "child" means any person below the age of eighteen years. Therefore, it stands proved from the above that the prosecutrix being below the age of 18 years was a child.

24. As per the medical evidence of PW-9 Dr. Smt. Madhuri Wankhede, the prosecutrix was found carrying pregnancy of 26-28 weeks when examined on 15.12.2013 vide Ex.P/14. According to learned counsel for the appellant, the prosecutrix has falsely implicated the appellant in this case as she was not explaining the inordinate delay of about seven months in lodging FIR.

25. According to the prosecutrix PW-1, she has specifically stated in her deposition that when she met the appellant at the time of marriage of her friend Chuleshwari at Village-Semra, the appellant after getting acquainted with her gifted her a mobile and thereafter, they had talk on mobile. Whenever the appellant used to meet her, he would express his love to her and assure her of marrying her. In the month of May, 2013 the appellant asked her to come to Sihava Chowk and when she reached there, the appellant along with his friend Kirtan took her on a motorcycle to Rigrishi Ashram instead of taking her to Gangrel dam. There the appellant sent away his friend Kirtan and took the prosecutrix to an isolated place, removed her clothes and on the allurements of marrying her, had sexual intercourse with her as a result of which she became pregnant. She did not inform about this incident to anyone, even to her parents, as the appellant had assured her of marriage and keeping her well.

However, after 6-7 months when the prosecutrix informed the appellant about her pregnancy and the appellant refused to marry her and told her to live at her parents' house after getting $\frac{1}{2}$ acre of land, then she returned to her home and informed about the entire incident to her parents. Thereafter, the FIR (Ex.P/2) was lodged on the basis of her written complaint Ex.P/1. There is no major contradiction or omission in her statement. She remained firm during her examination and nothing could be elicited from her to render her evidence doubtful or untrustworthy.

26. Learned counsel for the appellant has contended that the place Rigurishi Ashram where the incident is said to have taken place, is a very busy place as number of persons including the coconut sellers remain present there, and in these circumstances, it appears highly improbable that the appellant would have committed such an act at that place. The version of the prosecutrix also becomes doubtful because she remained silent for a considerable period of seven months.

27. This Court finds no substance in the above argument of learned counsel for the appellant for the reasons that the prosecutrix has clearly explained the circumstances in which the appellant took her to an isolated place and subjected her to sexual intercourse on the promise of marriage. According to her, the appellant had sexual intercourse with her on 8th May, 2013 and as per the medical evidence when she was examined on 15.12.2013 by PW-9 Dr. Smt. Madhuri Wankhede, she was found carrying pregnancy of 26-28 weeks. Therefore, there seems to be no

reason for false implication of the appellant by the prosecutrix. From the sequence of events, it appears that the prosecutrix was afraid after the incident due to her pregnancy and did not inform about the same to anyone as the appellant had promised her of marriage.

28. PW-2 Kumari Bai, mother of the prosecutrix, has also stated that the prosecutrix informed her that the appellant had given her a mobile phone, assured her of marriage and committed sexual intercourse with her due to which she became pregnant. PW-3 Krishna Kumar Jangde, father of the prosecutrix, has also proved the above facts.
29. PW-5 AL Chaturvedi, Sub Inspector, has proved the fact that the FIR (Ex.P/2) was lodged on the basis of written complaint Ex.P/1 made by the prosecutrix. PW-6 Dr. UL Koushil after medical examination of the appellant found him capable of performing sexual intercourse. PW-7 Swatantra Kumar Kaushal also states that when the prosecutrix became pregnant by six months, she informed that she got pregnant through the appellant. When the appellant refused to marry her, then the report was lodged by her. PW-9 Rajkumar Sori, investigating officer, has duly supported the prosecution case. PW-9 Dr. Smt. Madhuri Wankhede medically examined the prosecutrix on 15.12.2013 and found her carrying pregnancy of 26-28 weeks.
30. So far as the judgment relied upon by learned counsel for the appellant in the matter of *Krishan Kumar Malik* (supra) is concerned, in the said case, the Hon'ble Supreme Court

considering the quality of evidence of the prosecutrix which was shaky and suffering from exaggerations, contradictions and omissions, her conduct as well as many procedural lacunae in the prosecution case, acquitted the accused. However, in the present case, there is no such lacuna and the evidence of the prosecutrix, as discussed above, inspires confidence of the Court and duly corroborated by the medical evidence. The delay in lodging the FIR has also been satisfactorily explained by her. Therefore, the above judgment is also of no help to the appellant.

31. So far as the FSL report (Ex.P/20) is concerned, though no human spermatozoa was found on the vaginal slides of the prosecutrix but from the evidence it stands proved that the incident of sexual intercourse between the parties took place on 8.5.2013 whereas her slides were seized on 15.12.2013 and thereafter examined at the FSL. Thus, mere absence of human spermatozoa on her vaginal slides cannot demolish the whole otherwise reliable prosecution case as the time period between the incident and the examination of the vaginal slides was very long. In this case, the period of pregnancy of the prosecutrix i.e. 26-28 weeks duly correspond with the date of incident she alleges i.e. 8.5.2013. Even otherwise, as per Section 29 of the Act, 2012 there is a presumption as to certain offence. According to this section, where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to

commit the offence, as the case may be unless the contrary is proved. However, in this case, the defence has utterly failed to adduce any evidence to the contrary or in rebuttal. Though the defence has alleged that the prosecutrix was having relation with one Harish Kumar but no any relation of the prosecutrix with that person is established by the defence through any evidence. Hence, this defence also being without any substance is hereby rejected.

32. It is a well settled principle of law that solitary evidence of the prosecutrix itself is sufficient to sustain the conviction in sexual assault cases provided the same inspire confidence and appears to be absolutely trustworthy, unblemished and of sterling quality. In this case, not only the evidence of the prosecutrix is trustworthy and free from the suspicion of falsity, but it also gets corroboration from the evidence of her parents (PW-2 & PW-3) and other witnesses as also from the medical evidence.

33. Thus, on the basis of aforesaid discussions, this Court is of the opinion that the appellant had sexual intercourse with the prosecutrix, who was a minor below the age of 16 years on the date of incident i.e. 8.5.2013, on the false promise of marriage. Being so, the trial Court was fully justified in holding him guilty and passing the impugned judgment.

34. In the result, the appeal being without any substance is liable to be dismissed and is hereby dismissed. The appellant is reported to have been released on 1.6.2018 from jail after completing the entire sentence vide report dated 17.6.2020 of Assistant Jail

Superintendent, District Jail-Dhamtari (CG). As such, there is no need to pass any order regarding his arrest, surrender etc.

Sd/

(Gautam Chourdiya)

Judge

Khan