

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 13/09/2021****Order Delivered on 03/12/2021****CRA No. 1678 of 1999**

- Ganesh Kumar S/o Toran Pradhan aged about 19 years, R/o Basni, P.S. Mawai, District - Mandla (M.P.).

---- Appellant**Versus**

- State of M.P. (Now Chhattisgarh), Through : P.S. Chilpi, Tahsil & District - Kawardha.

---- Respondent

For Appellant	:	Mr. Dharmesh Shrivastava, Adv.
For State/Respondent	:	Mr. Raghvendra Verma, G.A.

Hon'ble Smt. Justice Rajani Dubey**C A V Order****Date : 03/12/2021**

1. The present appeal arises out of the impugned judgment of conviction and order of sentence dated 28.05.1999 passed by the learned Additional Sessions Judge, Khairagarh, Sessions Division Rajnandgaon (M.P.), in S.T. No. 171/1998 whereby, the learned Additional Sessions Judge has convicted and sentenced the appellant as under :-

Conviction	Sentence
U/s 363 & 366 of IPC	R.I. for 5 years and fine of Rs. 500/- in default of fine additional R.I. for 3 months, under each of the provisions.

2. Brief facts of the case are that on 27.04.1998 Gurucharan (PW-2) lodged a complaint to the effect that his daughter aged about 15 years has been found missing and he was suspecting that the appellant might have abducted her. After registering the missing report under Rojnamcha Sanha Number 822, the police of Chilphi, police station made search and she was recovered from the house of the accused at village Basni. It is the case of prosecution that the prosecutrix was a student of Class V in Chilphi School. On her way to school, the accused used to tease her later on she fell in

love with him. The prosecutrix, being a minor, was allured by the accused and on the date of incident i.e. 26.04.1998, she escaped from her house along with the accused to village Basni. After investigation charges-sheet was filed and charges were framed under Sections 363, 366 and 376 of IPC.

3. So as to hold the accused/appellant guilty, the prosecution has examined as many as 6 witnesses. Statement of the accused/appellant was also recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him and pleaded innocence and false implication in the case.

5. Upon consideration of oral and documentary evidence the trial Court acquitted the appellant of the charge under Section 376 of IPC and held that the prosecution has established the guilt of the accused/appellant under Sections 363 and 366 of IPC and sentenced him as mentioned above. Hence, this appeal.

6. Learned counsel for the appellant submits that the impugned judgment of conviction and order of sentence under Section 363 and 366 of IPC against the appellant is illegal and perverse, the finding of guilt against the appellant given by learned trial Court is perverse being contrary to evidence on record. He next submits that the learned trial Court has failed to observe that the prosecution has failed to prove its case beyond all reasonable doubts. He further submits that the evidence of prosecution witnesses are full of contradictions and omissions, therefore, their statements are not reliable. The learned trial Court has committed error of law and facts in holding that the age of the prosecutrix was 17 years at the time of commission of offence. He lastly submits that the prosecution has completely failed to prove that the prosecutrix was minor at the time of commission of offence. The conviction and sentence has been passed solitary factual position in respect of age of the prosecutrix which is not proved beyond reasonable doubts by the prosecution, therefore, the impugned judgment of conviction is liable to be set aside. In support of his argument he has placed reliance in the matter of **State of Karnataka Vs. S. R. Mahesh** passed in **CR.A. No. 524/2014 along with CR. A. No. 194/2014** by Karnataka High Court vide judgment dated 08.09.2020; in the matter of **S. Vardarajan Vs. State of Madras** passed in **CR.A. No. 46/1963** by the Supreme Court of India vide judgment dated 09.09.1964; in the matter of **Narinder Vs. State of Haryana** passed in **CR.A. No. 164-SB/1990** by Punjab & Haryana High Court vide judgment

dated 30.05.2003; in the matter of **Jaipal Batham Vs. State of U.P.** passed in **Cr.A. No. 6511/2011** by High Court of Allahabad vide judgment dated 10.02.2021 and in the matter of **Bhagwat Vs. The state of Maharashtra** passed in **Cr.A. No. 466/2016** by Bombay High Court vide judgment dated 07.06.2019.

7. On the other hand State counsel supported the impugned judgment of conviction and order of sentence.

8. Heard counsel for both the parties and perused the material available on record including the impugned judgment.

9. Gurucharan (PW-2) father of the prosecutrix has stated that he has got his daughter admitted in class one at Chilphi School and the date of birth was also registered at the time of admission. Now, he has forgotten, therefore, he cannot tell her exact date of birth. He has stated that as of now, she is 17 years and 3 months.

10. Smt. Sunita Mahilang (PW-3) has stated that she was posted as superintendent in Kanya Ashram, Chilphi since the year 1994 and she gave the certificate (Ex.-P/3) to the police on the basis of Dakhil Kharij Register (Ex.-P/4'C') and as per the school register entry No. 600, date of birth of the prosecutrix is 28.01.1982. In cross-examination she has stated that she does not know that who was registered the entry No. 600 in Dakhil Kharij Register because she was posted since the year 1994 and the entry was made before her joining.

11. Panmati (PW-4) mother of the prosecutrix has stated that she is their elder child and at the time of incident, her daughter would have been 15-16 years and now she is 17 years of age.

12. In the instant case, the ossification test was not conducted for age determination of the prosecutrix by the prosecution. There is no evidence on record that the prosecutrix was enticed or taken away from lawful guardianship by the appellant rather from the evidence on record, it shows that the prosecutrix went away with the appellant of her own free will and the appellant has used no force for taking her away. In her statement, the prosecutrix has deposed that she went to the Bus stand with the appellant and from there they went to village Pandutara and from there they went to village Pasni by walk and reached at 4 O'clock.

13. Learned trial Court also found that the prosecutrix is a consenting party and she was not forced by the appellant. In the instant case the

prosecution did not establish the age of the prosecutrix to be below 18 years beyond all reasonable doubt. Ex.-P/3 and Ex.-P/4 have not proved the age of the prosecutrix. Father and mother of the prosecutrix have not disclosed the correct age of the prosecutrix. Ossification test was not conducted by the Investigating Officer. In a criminal case, burden to prove the age of the prosecutrix is upon the prosecution but in the instant case the prosecution has failed to prove the age of the prosecutrix to be below 18 years, therefore, the offence under Sections 363 and 366 is also not proved against the appellant.

14. As discussed above, the impugned judgment of conviction and order of sentence is set aside. The appeal is allowed and the accused/appellant is acquitted of the charges levelled against him. As the appellant is on bail, he need not surrender and his bail bonds and sureties stand discharged.

**Sd/-
(Rajani Dubey)
JUDGE**