

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.254 of 2016

Judgment Reserved on : 24.8.2021

Judgment Delivered on : 17.9.2021

Shiv Shanker @ Ajay @ Golu Bhat, aged about 26 years, son of Jivan Bhat, resident of Village Deogaon, Police Station Masturi, District Bilaspur, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Station House Officer, Police Station Pipariya, District Kabirdham, Chhattisgarh

--- Respondent

For Appellant	:	Shri C.R. Sahu, Advocate
For Respondent	:	Shri Sushil Sahu, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal has been preferred against judgment dated 3.7.2015 passed by the Special Judge under the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the Pocso Act'), Fast Track Court, Kabirdham in Special Sessions Trial No.102 of 2015, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 4 years and fine of Rs.500 with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 4 years and fine of Rs.500 with default stipulation
Under Section 6 of the Pocso Act	Rigorous Imprisonment for 10 years and fine of Rs.500 with default stipulation
	All the jail sentences are directed to run concurrently

2. According to the prosecution case, at the relevant time, age of the prosecutrix (PW2) was 16 years. Mother of the prosecutrix, namely, Chandrika (PW1) lodged a report (Ex.P7) against the Appellant alleging therein that prior to 1½ months of lodging of the report, the Appellant came her house and saying that some problem was in her house and, therefore, a worship was required to be performed and he also said that for the worship both of her daughters will be required to go to a temple. On this, she sent the prosecutrix (PW2) and her other daughter Shailu (PW10) along with the Appellant. 15 days thereafter, Shailu (PW10) returned home. On being inquired, the Appellant told her that on sending her son and daughter-in-law he will send the prosecutrix (PW2) back to home. Later on, she came to know that the Appellant and the prosecutrix (PW2) performed a *Jaimala* marriage (wearing garland to each other). On the basis of the said report, offence was registered. During investigation, the prosecutrix (PW2) was recovered. Her statement was recorded under Section 161 of the Code of Criminal Procedure. Statements of other witnesses were also recorded. On completion of the investigation, a charge-sheet was filed against the Appellant. The Trial Court framed charges against him.
3. To bring home the offence, the prosecution examined as many as 12 witnesses. Statement of the Appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the guilt, pleaded innocence and false implication. No witness has

been examined in his defence.

4. On completion of the trial, the Trial Court convicted and sentenced the Appellant as mentioned in 1st paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that the Appellant has been wrongly convicted by the Trial Court without there being sufficient evidence on record. From the statements of the prosecutrix (PW2) and her mother Chandrika (PW1), it appears that Chandrika (PW1) herself had sent the prosecutrix along with the Appellant. Thereafter, the Appellant and the prosecutrix performed marriage. Therefore, if any physical relationship took place between them, that was with the consent of the prosecutrix. It was further argued that there is no conclusive evidence on record on the basis of which it could be said that the prosecutrix was below 18 years of age on the date of incident. Since she was a consenting party and she herself left home and joined the company of the Appellant, conviction of the Appellant is not sustainable.
6. Opposing the above arguments, Learned Counsel appearing for the State supported the impugned judgment. Referring to the statement of Head Constable Yogeshwar Singh (PW12), it was argued by Learned State Counsel that according to the entries of birth-death register (Ex.P19C), date of birth of the prosecutrix is 30.12.1998. Therefore, it is well established that she was below 18 years of age at the relevant time. Hence, her consent cannot be considered to be a valid consent. Therefore, conviction of the

Appellant is in accordance with the evidence available on record.

7. I have heard Learned Counsel appearing for the parties and minutely perused the record of the Trial Court including the statements of the witnesses.
8. As regards the incident, from the statements of the prosecutrix (PW2) and her mother Chandrika (PW1), it is well established that the Appellant had come to their house and told them that a touchwood had affected their house and for removal thereof he took the prosecutrix (PW2) and Shailu (PW10), other daughter of Chandrika (PW1) along with him to a temple for performing a worship. 15 days thereafter, he sent back Shailu (PW10) to her house. In her Court statement, the prosecutrix (PW2) further deposed that the Appellant took her to the temple and committed sexual intercourse with her there. Thereafter, he took her to Sultanpur (Uttar Pradesh) and kept her there for about 1 month. There also, he continued to commit sexual intercourse with her. She further deposed that at Sultanpur, her brother and sister-in-law had come to her. But, she did not make them any complaint about the alleged rape with her. She further admitted that till she lived with the Appellant she roamed with him here and there freely and did not make any complaint to anyone against him. She further admitted that later on the Appellant himself took her back to Kawardha. Her own sister Shailu (PW10) also admitted that till she lived with the Appellant and the prosecutrix for 15 days, during that period, talks took place between the Appellant and her brother Dhaniram (not examined).

9. Chandrika (PW1), mother of the prosecutrix also admitted the fact that when the Appellant was taking the prosecutrix (PW2) along with him, at that time, she had given some clothes to the prosecutrix and sent them happily.
10. On a minute examination of the above evidence adduced by the prosecution, it is clear that the prosecutrix (PW2) was taken by the Appellant with the permission of her mother Chandrika (PW1). Later on, physical relationship developed between the Appellant and the prosecutrix. From the conduct of the prosecutrix, it is also well established that she had ample opportunity to come out of the clutches of the Appellant, but she did not even try to do so nor did she make any complaint against him at any place of her visit along with him. Furthermore, when her brother Dhaniram visited them, at that time also, she did not make him any complaint against the Appellant. Thus, it is well established that whatever physical relationship developed between them, that was with the consent of the prosecutrix.
11. With regard to the age of the prosecutrix (PW2), it is not in dispute that she is not an educated person and she never went to a school. Therefore, no documentary evidence of any school record is available regarding her date of birth. Though her mother Chandrika (PW1) was unable to state her age, she deposed that the prosecutrix was her third child and her age was about 16 years at the relevant time. This statement of Chandrika (PW1) is not duly rebutted during her cross-examination nor has she been put any contrary suggestion. The prosecutrix (PW2) herself deposed that

her age was about 16 years. According to the birth-death register (Ex.P19C), date of birth of the prosecutrix (PW2) is 30.12.1998. Though there is some overwriting over the name of the prosecutrix in the said document, Chandrika (PW1) and Shatruhan are shown there to be mother and father of the prosecutrix, respectively and the prosecutrix has been shown to be their third child. Chandrika (PW1) also deposed in her Court statement that the prosecutrix is her third child and this statement has remained unrebutted. Therefore, I do not find any reason to disbelieve the entries of Ex.P19C. From the unrebutted oral evidence of Chandrika (PW1) and documentary evidence (Ex.P19C), it is clear that the prosecutrix (PW2) was below 18 years of age at the relevant time. Therefore, her consent for the physical relationship cannot be considered to be a valid consent. Hence, conviction of the Appellant is in accordance with the evidence available on record. I do not find any merit in the appeal.

12. Consequently, the appeal is dismissed.

Sd/-
(Arvind Singh Chandel)
JUDGE